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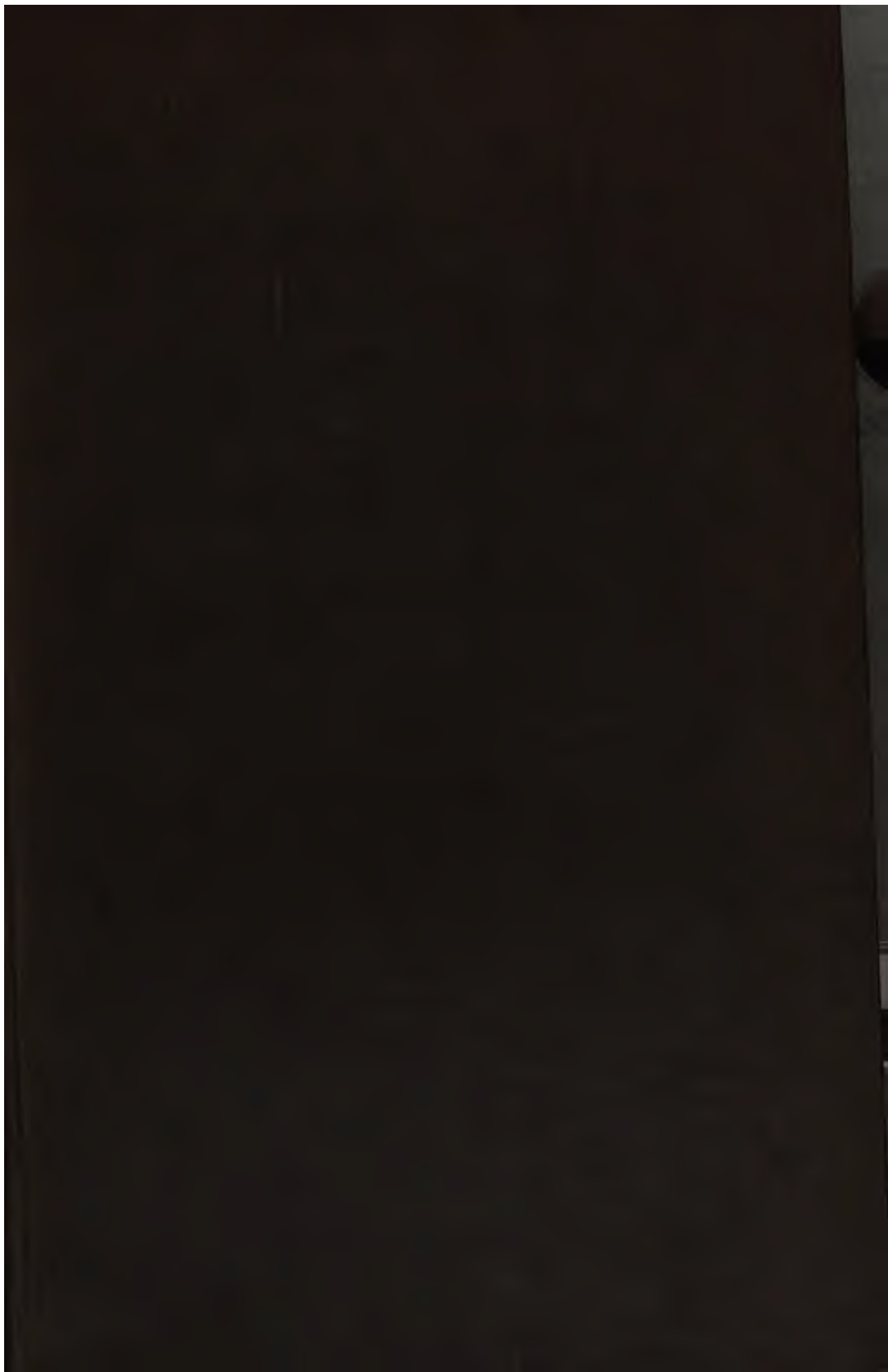
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LEADING CASES  
IN THE  
LAW OF SCOTLAND.  
LAND RIGHTS.

"ERUNT FORTASSE, QUIBUS NIHIL, NISI QUOD IPSI FECERUNT, PLACEAT; QUI NOSTRAM HANC FORENSEM OPELLAM ELEVENT, Freti Terentiano illo, nihil a me hic dici quod non sit dictum prius. Quibus hoc unum respondeo; me in hoc mihi vel quam maxime gratulari, quod nihil meum, nihil novum in hoc libro adduxerim."

SIR THOMAS CRAIG.

LEADING CASES  
IN THE  
LAW OF SCOTLAND

PREPARED FROM THE ORIGINAL PLEADINGS, ARRANGED IN  
SYSTEMATIC ORDER, AND ELUCIDATED BY OPINIONS  
OF THE COURT NEVER BEFORE PUBLISHED.

BY  
GEORGE ROSS, ADVOCATE.



VOLUME THIRD.

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## P R E F A C E.

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THE present volume completes the Illustration of the Law of LAND RIGHTS. The Author's object has been to systematize the Leading Judgments of the Court. In discoursing on the past history, present state, and future prospects of the Law in America, Mr. Story observes,—“ The mass of the Law is accumulating with an almost incredible rapidity, and with the accumulation the labour of Students as well as Professors is seriously augmented. It is impossible not to look without some discouragement upon the ponderous volumes which the next half century will add to the groaning shelves of our Jurists. The habits of generalization which will be acquired and perfected by the liberal studies which I have ventured to recommend, will do something to avert the fearful calamity which threatens us of being buried alive, not in the catacombs, but in the labyrinths of the law.”

By separating the Leading Cases in the Law from the accumulated mass of Decisions, it is hoped that the labours both of the Student and the Practitioner may be lessened. The Work, however, is far from being intended as one of reference merely. Its characteristic feature is that of “ teaching by examples.” A continuous perusal of it, therefore, it is hoped, may prove profitable to all who are desirous of being deeply grounded in the Law of Real Property in Scotland. To the legal Student there can be no more instructive reading than the Leading



## CONTENTS.

ix

	PAGE
The Earl of Argyle v. McNaughton, February 15, 1671, . . .	372
Munro v. Munro, May 19, 1812, . . .	373
The Earl of Fife's Trustees v. Sinclair, November 29, 1849, . .	378
Forbes v. Livingstone, November 29, 1827, . . .	409
Macdonell v. The Duke of Gordon, February 26, 1828, . . .	416
Gedde v. Baker, December 5, 1740, . . .	432
Culter v. McLellan, December 9, 1762, . . .	432
Caitcheon v. Ramsay, January 22, 1791, . . .	432
Spence v. Bruce, January 21, 1807, . . .	432
Robertson v. The Duke of Athole, May 10, 1815, . . .	432
The Earl of Marchmont v. The Earl of Home, July 28, 1724, .	433
Caitcheon v. Ramsay, January 22, 1791, . . .	434
Countess of Moray v. Wemyss, February 20, 1675, . . .	441
Magistrates of Perth v. The Earl of Wemyss, November 19, 1829,	442
Earl of Fife's Trustees v. Cumming, January 16, 1830, . . .	445
Graham v. Douglas, February 7, 1735, . . .	448
Inglis v. Boswell, May 1, 1849, . . .	450
Beaumont v. Lord Glenlyon, July 11, 1843, . . .	456
Scott v. Bruce Stewart, July 1, 1779, . . .	464
Blair v. Shedden, December 6, 1754, . . .	470
Gordon v. Gordon, December 21, 1784, . . .	474
Creditors of Achyndachy v. Grant, January 31, 1792, . . .	481

## PRESCRIPTION ON DOUBLE TITLES.

McDougall v. McDougall, July 10, 1740, . . .	510
Bruce v. Bruce Carstairs, April 7, 1772, . . .	518
Welsh Maxwell v. Welsh Maxwell, July 29, 1814, . . .	522
Gray v. Smith and Bogle, June 30, 1752, . . .	531
Durham v. Durham, November 24, 1802, . . .	531
Snodgrass v. Buchanan, December 16, 1806, . . .	531
Lord Elibank v. Campbell, November 21, 1833, . . .	534
Bontine v. Graham, August 6, 1840, . . .	568
Wilson v. Pollock, November 29, 1839, . . .	571

## PRESCRIPTION OF RETOURS.

Neilson v. Cochrane's Representatives, March 19, 1840, . . .	583
Campbell v. Campbell, January 26, 1848, . . .	595



## FEE AND LIFERENT.

	PAGE
Frog's Creditors v. His Children, November 25, 1735, . . .	602
Dewar v. M'Kinnon, May 5, 1825, . . .	607
Gordon v. M'Intosh, April 17, 1845, . . .	617
Newlands v. Newlands' Creditors, April 26, 1798, . . .	634
Allardice v. Allardice, March 5, 1795, . . .	652
Falconer v. Wright, January 22, 1824, . . .	662
Houlditch v. Spalding, June 9, 1847, . . .	667
Seton v. Seton's Creditors, March 6, 1793, . . .	682
Ross v. King, June 22, 1847, . . .	687
M'Intosh v. M'Intosh, January 28, 1812, . . .	708
Cuming v. His Majesty's Advocate, February 10, 1756, . . .	712
Baillie v. Clark, February 23, 1809, . . .	713
Wilson v. Glen, December 14, 1819, . . .	716
Madden v. Currie's Trustees, February 22, 1842, . . .	722
M'Gregor v. Forrester, April 13, 1834, . . .	732
Mackellar v. Marquis, December 4, 1840, . . .	741
Wilson v. Reid, December 4, 1827, . . .	754

**RESERVED RIGHTS IN  
THE TRANSMISSION OF LAND.**

**SECTION I.—RESERVED REAL BURDENS.**



# LEADING CASES

IN THE

## LAW OF SCOTLAND.

---

*A Reserved Real Burden must be precise in the amount of the sum, and in the name of the Creditor, must be declared a burden on the Lands and not on the Dispones merely, and must also be engrossed in the Sasine by which the burdened Estate is conveyed.*

### I.—MACKENZIE v. LOVAT.

IN 1715 the estate of Lovat, the property of Alexander Mackenzie of Fraserdale, was forfeited on account of his being engaged in the Rebellion of that year. In 1716 Lord Lovat received a grant of the estate from the Crown in consideration of his zeal and services in repressing that Rebellion. Lord Lovat having entered into possession of the estate, the tenants brought an action of multiplepinding, in which Lord Lovat and the creditors of Alexander Mackenzie were called. The creditors contended that they could not be prejudiced by any grant from the Crown of the single and liferent escheat of their debtor.

April 1, 1721.

NARRATIVE.

The Court Found, "That the rents of the lands were subject to the debts and diligences of the creditors."

JUDGMENT.  
Dec. 18, 1717.

Lord Lovat having appealed, "It was Ordered and Adjudged that the interlocutors complained of should be reversed, but

JUDGMENT.  
House of Lords,  
April 4, 1719.

MACKENZIE  
v.  
LOVAT.  
1721.

that such debts of the creditors of the said Alexander Mackenzie as were real, and did by the law of Scotland affect the estate in question at the time of the forfeiture of the liferent escheat, be charged on the said estate in due course, according to the said law."

The question then arose what debts were real, and affected the forfeited estate.

The estate of Lovat was purchased by Roderick Mackenzie of Prestonhall, one of the Senators of the College of Justice. His son, Alexander Mackenzie, the attainted party, married Amelia, sometime styled Baroness of Lovat, daughter of Hugh Lord Lovat. In 1706 Lord Prestonhall conveyed the lands, by a deed of entail, to his son Alexander in liferent; whom failing, to Hugh, styled Master of Lovat, his son, and the heirs-male of his body in fee. The deed provided "that the said Alexander Mackenzie, his liferent, and the other heirs their fee, should be affected, and stand burdened with the payment of all the lawful debts, and to the performance of all the deeds that the said Roderick Mackenzie should happen to be bound in or obliged to perform at the time of his decease by bond, or any other manner of way whatsoever." A charter was obtained in terms of this entail, upon which infeftment followed.

Lord Prestonhall died in 1708. In 1717 Alexander Mackenzie of Gairloch, to whom Lord Prestonhall was indebted by bond, obtained a decree of declarator and adjudication, declaring the liferent of Alexander Mackenzie, the forfeiting party, and the fee of Hugh Master of Lovat, and the lands themselves, subject to the payment of what was due on the bond, amounting to £6132 Scots. This decree was obtained after the dates of the forfeiture and the gift of the liferent escheat in Lord Lovat's favour. In virtue of this adjudication, Alexander Mackenzie of Gairloch brought an action of mails and duties. In this action Lord Lovat appeared and objected, that the clause in the entail did not make the debts of Lord Prestonhall real charges upon the estate.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—The debts of the granter were

certainly real by the express words of the clause in the deed of settlement. The liferent of Alexander Mackenzie and the fee of the Master of Lovat are declared subject to the payment of all the granter's debts. By the law and practice of Scotland this is the proper mode of burdening conveyances of lands with debts due to third parties, so as to make these debts real. By following this mode a preference is given to the creditors of the disponent over the creditors of the disponent.

MACKENZIE  
v.  
LOVAT.  
1721.

The creditors in the debts so burdening the infestment of the disponent have no access to the rents, it is true, without an adjudication, that being the legal mode of obtaining possession. The debts, however, are burdens upon the infestment; and when an adjudication is led upon them, the adjudger has immediate access to the rents, and will be preferred, not according to the date of the adjudication, but according to the date of the infestment burdened. All infestments, or real rights granted after the infestment of property, although before the date of the adjudication, will be postponed to the debts burdening the infestment of property, the debts being real from the date of the infestment burdened.

PLEADED FOR THE DEFENDER.—The general clause in the entail could not make the debt due to the pursuer's father a real charge on the estate at the time of the forfeiture. The debt is not mentioned in the settlement; and at the time of the forfeiture the pursuer was not entitled to bring any real action against the estate. If general clauses of this nature should obtain a contrary construction, no purchaser of land in Scotland would be safe.

ARGUMENT FOR  
DEFENDER.

The LORD ORDINARY Found, "That the said Lord Prestonhall having conveyed the estate to Mr. Mackenzie, the forfeiting person, with the burden of his debts, and the said burden being repeated both in the procuratory of resignation and precept of sasine, the said Lord Prestonhall's debts are real, and preferable to the debts and deeds of Mr. Mackenzie; and that Alexander Mackenzie was creditor to Lord Prestonhall by virtue of the instructions in process before the date of the entail, and therefore preferred him to Lord Lovat, the grantee."

Interlocutor of  
Lord Ordinary.

MACKENZIE

v.

LOVAT.

1721.

JUDGMENT.  
Dec. 24, 1719.JUDGMENT.  
House of Lords,  
April 1, 1721.

The defender having reclaimed, the Court "Adhered."

The defender having appealed to the House of Lords, "It was Ordered and Adjudged, that so much of the interlocutors complained of as decree the debts claimed by and on the behalf of Alexander Mackenzie of Gairloch be reversed."

1. In the case of *DUFF v. GORDON*, April 21, 1721, Sir Alexander Innes, in 1707, conveyed his lands of Cuxton to his eldest son George, with and under the burden always of payment of all the lawful debts contracted, or to be contracted by him, and particularly the payment of his younger children's provision. All these debts and provisions the said George Innes became bound, by his acceptance of the right, to satisfy in the same manner as if they were specially set down, and in the same manner as Sir Alexander was bound; and with and under these burdens, provisions, and conditions, the right and disposition was declared to be granted and accepted, and no otherwise. In 1712 Sir George Innes, after his father's death, sold the lands to Mr. Duff, who applied part of the price in the discharge of such debts as appeared from the records to be charged on the estate, and he paid the remainder of the price to Sir George. In 1719 Mr. Gordon, the pursuer, having acquired right by assignation to certain bonds executed by Sir Alexander, brought an action against the son

of Sir George, and concluded to have the lands of Cuxton adjudged to him in satisfaction of his debt. Mr. Duff appeared as a defender, and stated that he had purchased the lands for a valuable consideration without notice of the bonds claimed upon, and that none of them had been put upon record till six years after his purchase. The Court, December 2, 1719, "found that the debts were a real burden upon the subjects disposed." The defender appealed to the House of Lords, and **PLEADED**—Purchasers are always safe by the law of Scotland, when no debt or encumbrance upon the land to be purchased appears upon record. The general clause in the disposition, subjecting the son to the payment of the father's debts, could be no notice to the purchaser what these debts were, since they were neither upon record, nor particularly mentioned in the deed, which ought to be done when debts are intended to be made a real charge upon the estate. The payment of the debts are directed upon the disponent, and not upon the subject disposed. The words of the deed are,—"That the grantee shall be

subject to the payment of the debts in the same manner as the granter himself was." The granter was only bound personally. The debts, therefore, being no real burden on the lands in his person, they cannot be so in the person of his son.

2. The following entry is taken from the Journal of the House of Lords:—"The Counsel for the appellant, William Duff, having opened the matter of his appeal, and shown 'that the complaint of the interlocutors, finding the bond-debts in question real burdens on his estate, is founded upon a point already adjudged by this House,' the Counsel for the respondent, George Gordon, admitted it to be so, and therefore would not enter into the defence of the said interlocutors; and farther declaring, 'that he, looking upon the reversal of these interlocutors to put an end to the whole contest between the parties to these appeals, declined to trouble the House with arguments in support of the bonds in question against the interlocutors complained of by the appeal of the said George Gordon.' Wherefore the Counsel for the said William Duff prayed 'that the appeal of the said George Gordon be dismissed.' And upon due consideration had of what was offered on either side in the said causes, it is ordered and adjudged, that the said interlocutor of the 2d of December 1719, finding the bond-debts real burdens upon the estate in question, and the interlocutor of the 1st of January following in affirmance thereof, be reversed, and that the petition and

appeal of George Gordon, complaining of the said interlocutor of the 13th and 25th of February 1720-1, and the interlocutor of the 9th of June last, in affirmance thereof, be dismissed, without prejudice to any demands the said appellant, George Gordon, may have upon the two bonds in question against any other person beside the said William Duff, the original appellant."—*House of Lords' Journal*.

3. In the case of the Creditors of M'Lellan, July 1734, M'Lellan settled his estate upon his younger brother, declaring that these presents were granted "with the burden of all my just and lawful debts contracted, or to be hereafter contracted be me." On a competition afterwards arising between the creditors of the disponent and those of the disponent, the Court found that the burden was not real upon the lands, and preferred the creditors of the disponent. In reference to the cases now given, ERSKINE observes,—“A clause, charging the lands contained in the grant with the disponent's debts in general terms, without mentioning the names of the creditors, was, by repeated decisions, in the cases of the creditors of Lovat, Cuxton, and Kersland, adjudged to constitute a real burden on the lands disposed, in consequence of the right competent to all proprietors, of disposing of their property under such conditions and limitations as they shall judge proper. But two of those judgments having been reversed by the House of Lords, the Court of Session did, in July 1734,



Creditors of McLellan, (not reported,) and by several later decisions, alter their former rule, upon this principle, that no perpetual unknown encumbrance ought to be created on lands, because the purchaser cannot, by the strictest inquiry, know who the creditors in that burden are, so as, by a proper process, to force the production of their grounds of debt, in order to clear it off."—*Erskine*, 2, 3, 50.

## II.—BROUGHTON'S CREDITORS v. GORDON.

June 20, 1780.

NARRATIVE.

In 1710 Sir David Murray of Stanhope, in the marriage-contract of his eldest son Alexander, disposed the lands of Broughton to him, "with the express burden of payment to the said David Murray his creditors, of the haill debts and sums of money due by him to them, and contained in a particular list and inventory of the said debts: as also with the burden of payment to the said Sir David his children, of the respective provisions and portions granted by the said Sir David to them, all particularly set down in the foresaid list and inventory subscribed by the said Sir David and the said Alexander Murray's of the date of these presents." The list and inventory of the debts and provisions were registered in the books of Council and Session.

Sir Alexander Murray thereafter sold the lands to John Douglas, uncle to the Earl of March. As Mr. Douglas died encumbered with great debts, the Earl of March, as his apparent heir, raised and carried through a judicial sale of the lands. They were purchased by John Murray, a son of Sir David by a second marriage. Mr. Murray raised an action of multiplepoinding of the price, in which action Mr. Robert Gordon compeared as a creditor of Sir David Murray, in respect of a provision of 7000 merks granted by him to his daughter Ann, whom Mr. Gordon had married, and which provision was included in the list and inventory under burden of which the lands had been conveyed by Sir David to his eldest son. Mr. Gordon claimed to be preferred to the creditors of Mr. Douglas, on the ground that the children's provisions were real burdens on the lands, and were therefore effectual against the debts and deeds of Sir Alexander, or those deriving right from him.

PLEADED FOR MR. GORDON.—From the conception of the clause in the contract of marriage the burden is really conceived. It is insert in the procuratory of resignation, and the lands are declared expressly to be resigned with the burden of the debts and the children's provision, conform to the list subscribed by Sir David and his son. No infetment could proceed without reference to that list, nor could any purchase be regularly made without the purchaser obtaining the list of debts with the progress. The purchaser therefore could not pretend ignorance of the list or the extent of the burden contained in it. According to the former rule of law, a general burden of all the disponent's debts imposed upon the disponent's right to the lands, was effectual against all the onerous creditors of the disponent or purchaser from him. This rule has been receded from with respect to general burdens, because it was thought to exeem the subject from commerce, and to render the records useless, as it was impossible either from them, or from the right itself, to discover the extent of the burden. But in the present case the burden is not general but special, having been rendered so by the reference to the subscribed list of the debts and the children's provisions. That list every purchaser ought to have possessed himself of at making the purchase, as well as with the progress of titles. The children's provision are therefore real burdens, and preferable to all the debts and deeds of Sir Alexander Murray, and those deriving right from him.

BROUGHTON'S  
CREDITORS  
v.  
GORDON.  
1739.  
ARGUMENT FOR  
MR. GORDON.

PLEADED FOR THE CREDITORS.—The lands of Broughton were sold by Sir Alexander Murray to Mr. Douglas, freely and absolutely, without any reservation, provision, or condition whatever. The creditors of Mr. Douglas have, therefore, no concern with the conditions contained in the conveyance by Sir David to his son. From the conception of the contract of marriage, Sir David's debts and the provision to the children are not made real burdens on the estate, but only personal burdens on the disponent. The disponent trusted to the faith of the disponent, and reserved no right in the lands disposed for security and payment of the debts and provisions. Nothing more is imported by the different clauses of the deed, than that the said burden on the disponent shall be narrated in the infetments and

ARGUMENT FOR  
CREDITORS.

BROUGHTON'S  
CREDITORS  
v.  
GORDON.  
1739.

resignations, but not that the provision to pay the same should, by the resignation and infeftments, become burdens on the lands.

But farther, the debts and provisions are not specified in the contract, nor in the precept of sasine granted to Sir Alexander, nor in any infeftment that has followed thereupon. These debts and provisions are only referred to as contained in a list, but the list is not inserted in any of the said deeds. A purchaser from the proprietor of a real estate who is infeft thereon, is not obliged to go farther than the public records in order to know the burdens and provisions that affect the estate. He is therefore not concerned with any reference not contained in the deed itself, nor duly recorded. Recording the list of debts and provisions in the Register of the Session is not sufficient; it ought to have been recorded in the Register of Sasines and Reversions, in order to be sustained as a real burden on the lands on which the sasine was taken. That is the only register which people actually do, or are bound to search, for the purpose of ascertaining real burdens. With the Register of Session they have nothing to do, it serves only for registration of diligence or for conservation.

JUDGMENT.  
June 20, 1739.

The Court Found, "That the clause in the contract of marriage burdening the lands, and the resignation therein mentioned, burdening the lands with payment of Sir David Murray's debts, contained in a list and inventory thereof, neither expressed in the contract of marriage aforesaid, nor registered in the Register of Sasines and Reversions, does not render the debts in question a real burden upon the lands conveyed by Sir David Murray to his son Alexander by the said contract of marriage."

Elchies' Deci-  
sions, vol. ii. p.  
529.

LORD ELCHIES in the notes to his Decisions observes,—“I was in the Outer-House when this cause was advised, and I am told the Lords pretty unanimously found these children's provisions were not real burdens. I am also told the grounds were two: *First*, That the disposition was not with the burden of these debts, but with the burden of payment of debts, and this was Arniston's opinion, but the majority were not of that opinion.

The *second* was, That this list of debts was not inserted *in gremio* of the disposition, nor registered in the Register of Sasines, but only in the Books of Session. This deserves to be well considered."

BROUGHTON'S  
CREDITORS  
v.  
GORDON.  
1739.

LORD KILKERRAN in his Decisions observes,—“ A father having disposed his estate to his eldest son in his contract of marriage, with the burden of his debts in general, as contained in a list or inventory therein referred to, the general burdening clause was also engrossed in the procuratory of resignation, and the list registered in the Books of Session. It was, notwithstanding, found that the particular debts not being expressed in the contract, nor the list registered in the Register of Sasines and Reversions, the said clauses in the contract and procuratory of resignation did not render these debts real burdens upon the lands conveyed by the father to the son.”

Kilkerran's  
Decisions, p.  
888.

LORD MONBODDO in his Decisions observes,—“ The Lords found unanimously, that the debts were not real, but they differed as to the *ratio decidendi*. Arniston thought that the words in the disposition did not imply a real burden upon the estate, but only imposed a personal obligation upon the disponee; that the father could never mean to make his debts real which were before personal, but only to bind his son, who had got his estate, to relieve him of his debts. And it was upon this he founded the decision. But the rest of the Lords were of opinion, that the words, in themselves, did impose a real burden, but that, in this case, as the debts were not inserted in the disposition or sasine, nor the list referred to registered in the Register of Sasines, therefore there was no real burden; because, if it was otherwise, the lands would, in some measure, be exeeemed from commerce, and the records rendered useless as to them, because it would be impossible to discover from them what burdens affected the lands; so that no purchaser could safely buy them, nor creditor lend them upon the faith of them.”

Brown's Supp.,  
vol. v. p. 665.

III.—ALLAN *v.* CAMERON'S CREDITORS.

May 15, 1781.

NARRATIVE.

John Cameron conveyed his estate to his eldest son Richard, under condition that he should pay all his debts, and make payment to Janet Allan, his mother, of the different liferent annuities, amounting in all to £100, provided to her by her contract of marriage, and by a bond of the same date with the disposition, and likewise pay to the younger children the several sums provided to them, in a bond of provision executed in their favour, also of the same date with the disposition. The burdens and provisions were appointed to be engrossed in the infetment, and they were accordingly specified in the instrument of sasine.

A competition ensued between the creditors of Richard Cameron on the one hand, and his mother, brother, and sisters, on the other—the latter contending that their respective provisions were real burdens on the lands, and entitled to a preference over the other creditors.

ARGUMENT FOR  
WIDOW AND  
CHILDREN.

PLEADED FOR THE WIDOW AND CHILDREN.—To constitute a real burden upon lands by any condition or quality annexed to the grant, the law requires no precise form of words. It is enough that the intention of the granter to burden the subject of the grant, or the right of the granter to the subject, as well as the granter himself personally, is expressed in such a way that the deed and the record may give notice to all who deal with the granter, that the property is preferably burdened, to whom and for what sum.

In the present case these requisites concur. The disposition burdens the disponent with the wife's annuity and the children's provision, and appoints these burdens to be engrossed in the infetment. It is impossible to put any other construction upon this appointment than that the lands were meant to be burdened. Nor could any person who examined the deed or the record imagine that these provisions were not constituted real burdens. If real burdens, they must of course operate in preference over the debts contracted by the disponent.

The security of the records will not be invalidated by the

pursuers' claim being sustained. The security of the records depends on the infeftment, and in the present case the burdens and provisions are accurately and precisely specified in the instrument of sasine as ordered by the disposition. The defender therefore cannot say that they were misled by the records, for whoever contracted with the disponent on the faith of his real property, must have seen that it stood preferably burdened in favour of the pursuers.

ALLAN  
v.  
CAMERON'S  
CREDITORS.  
1781.

PLEADED FOR THE DISPONEE'S CREDITORS.—Two things are requisite by the law of Scotland to create a real burden upon land. The *first* is, that the burden be so expressed in the deed as clearly to denote a burden upon the lands, and not merely to create a personal obligation on condition of payment directed against the disponent. The *second* requisite is, that the burden be specially engrossed in the procuratory of resignation or precept of sasine, which are the warrants for infeftment, and also in the instrument of sasine itself.

ARGUMENT FOR  
DISPONEE'S  
CREDITORS.

No unknown or indefinite encumbrance can be created on lands, so as to have the effect of a real security, in competition with creditors and singular successors, whatever the intention of the disponent may have been. In the present case the bonds, and annuity, and provision, of themselves were personal deeds, creating no lien whatever upon the lands. The burdens were not specifically expressed in the warrant for infeftment, and in expediting the infeftment upon it the notary had no right to exceed the warrant by engrossing in the sasine burdens and provisions from other relative deeds. The widow's annuity is the only debt which is specially mentioned in the disposition, but the disponent is only taken personally bound to pay it. The lands are not burdened with it as a real debt or *debitum fundi*, but the disposition is granted under the condition that the disponent shall pay. The children's provisions are only referred to in general terms. But it is not enough that they are contained in another deed of the same date, for that was a mere personal deed, containing no warrant for infeftment, and third parties are not obliged to know anything of personal deeds. The burdens, if intended to be real, ought to appear in the deed itself, which is the warrant for infeftment. They ought to appear in

ALLAN  
v.  
CAMERON'S  
CREDITORS.  
1781.

the procuratory or precept in virtue of which the infeftment is given, and the notary who expedes the infeftment, has no right to exceed his warrant and go to other deeds, and engross their contents in the instrument of sasine. The sasine must proceed on its own proper warrant contained in the deed itself on which the infeftment is to be taken, and if there be any blank in the warrant, the notary has no power to fill it up.

JUDGMENT.  
July 19, 1780.

The Court Found, "That the provisions to the widow and younger children were not real burdens upon the estate disposed."

JUDGMENT.  
Nov. 24, 1780.

The widow and children having reclaimed, the Court "Adhered."

OPINIONS.  
MS. Notes,  
Sir Hay Camp-  
bell's Session  
Papers.

LORD BRAXFIELD observed,—“The provisions which are to be engrossed in the infeftment are the provisions mentioned in the disposition itself, not in separate deeds. The disponent engrosses the bond of provision, though it is no part of the disposition. The notary is not authorized to take in a separate deed. He could only take in his hand the disposition. In the disposition the burden is general. The bond of provision is not the warrant of infeftment. Suppose disponent had in view to give preference to other creditors of the defunct, and produces bond to A and another to B. Whatever the disponent's intention was, it must be expressed in clear terms, and not by implication, in a question with creditors and purchasers. Here we must go to relative deeds.”

LORD KAIMES observed,—“Taking in nothing but what is in disposition, there is no real burden. To disponent an estate with burden of disponent paying, is personal and inoperative against creditors. It ought to be *totus teres atque rotundus*. If we alter, we open a door to bad consequences. If we adhere, it will only put people more on their guard.”

LORD PRESIDENT DUNDAS observed,—“The question is of great importance. I am for adhering. Intention out of question. The case deeply affects the records. Sasine must proceed on a proper warrant, and we must find from the disposition what the burdens are. A party must not leave a blank in the warrant to be filled up in the sasine. Burdens must be

certain from the deed itself, which is the warrant of the sasine."

ALLAN  
v.  
CAMERON'S  
CREDITORS.

The widow and children having appealed to the House of Lords, LORD THURLOW presiding as Chancellor, "It was Ordered and Adjudged that the appeal be dismissed and the interlocutor complained of be Affirmed."

1781.  
JUDGMENT.  
House of Lords,  
May 15, 1781.

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IV.—STEWART v. HOOME.

In 1768 David Hoome Stewart of Ardgaty disposed his estate in favour of his brother, Dr. George Stewart, but under the special conditions and provisions "that the said Dr. George Stewart should be burdened with and obliged to pay his whole lawful debts," also an annuity of £25 which he had granted to his sister, and also a bond for £500 which he had granted to a younger brother.

May 18, 1792.  
NARRATIVE.

In 1782 Dr. George Stewart made up a list of the debts due by him, amounting to £5262, for part of which he granted an heritable bond for £2000. He died in 1784, and was succeeded by his eldest son, who again was succeeded by his daughter, the defender. The pursuer, as the widow of Dr. George Stewart, claimed her terce out of the lands in which her husband died infeft. The defender objected, on the ground that her claim was excluded both by the heritable bond for £2000, and also by the annuities granted and debts contracted by her husband's brother, David Hoome Stewart, under burden of which the estate was settled on her husband and the other heirs of entail.

PLEADED FOR THE WIDOW.—By the clause in the deed 1768, the debts contracted, and the annuities granted, by the author, are not made real burdens upon the lands. The creditors in them cannot pretend that they have a lien over the lands in consequence of an infeftment either in their own persons or in the person of the proprietor. To consider such debts as real would be destructive of the security arising from the records,

ARGUMENT FOR  
WIDOW.



STEWART  
v.  
HOOME.  
1792.

and inconsistent with the rule of law, that there can be no real burden upon lands that cannot be discovered by creditors or purchasers. The infestment of the husband is both the security and the measure of the wife's terce, the terce, therefore, can only be diminished or affected by infestment.

ARGUMENT FOR  
HEIR.

PLEADED FOR THE HEIR.—The lands were disposed to the pursuer's husband, always with and under certain provisions, conditions, and reservations, which were appointed to be engrossed in the infestments to follow thereon. This declaration, coupled with the conditions themselves, is sufficient to constitute the debts and annuities a real burden upon the estate.

But even if they were not to be held to be real burdens on the lands, the pursuer's claim of terce is excluded. A widow in claiming terce stands in a similar position to that of an adjudger. The only persons to whom the necessity applies of the particulars and extent of a real burden appearing upon the records, are those who purchase or acquire rights upon the faith of the records. An adjudger takes his debtor's estate by the operation of the law, and not by special bargain with the proprietor. He therefore cannot plead having advanced his money on the faith of the records. He must take the subject *tantum et tale* as it stood in his debtor, and subject to every burden which affected it in his person. The right of terce arises from no special convention and is secured by no special agreement. Her legal interest in the state of her husband vests *tantum et tale*, as it stood in himself, and subject to every claim with which it was affected in him. Agreeably to this doctrine, the case of Thomson v. Douglas, Heron, and Company, was decided so late as 15th November 1786.

Interlocutor of  
Lord Ordinary.

LORD MONBODDO, Ordinary, Found, "That whatever annuities or debts upon the lands of any kind mentioned in the deed of entail, as a burden upon the estate entailed, must in so far restrict the claim of terce."

JUDGMENT.  
May 18, 1792.

The widow having reclaimed, the Court "Altered, and Found, that the annuities, &c., are not real burdens, but personal."

LORD JUSTICE-CLERK MACQUEEN observed,—“ The principle in the interlocutor is right. A real burden must affect the terce. But I think it does not apply to the case. The heir is burdened with these debts, but the lands are not. A purchaser or adjudger would take the lands free. It is a burden on the disponee, Dr. Stewart, and his heirs. The engrossing in the infetment will not alter the words or their legal import. Decisions have settled this doctrine.”

STEWART  
c.  
HOOME.

1792.

OPINIONS.  
MS. Notes,  
Baron Hume's  
Session Papers.

LORD DREGHORN.—“ What is a legal burden is not a *quæstio voluntatis*. It must be done in a certain way by use of fixed terms. In this case he meant, I think, to burden the lands, but he has not done it. Case of Cameron was the same, and a hard case.”

LORD PRESIDENT CAMPBELL.—“ I agree to that doctrine. What is engrossed in the infetment is only that Dr. Stewart shall be burdened, and so it remains. An adjudger would take these lands free of any such burden, for there is a mistake at the bar about the doctrine of *tantum et tale* applied to adjudgers. This is owing to the decision in case of Richard Thomson. But there is no such doctrine. An adjudger infet is in the same case as an heir to the creditor infet. This matter investigated and settled in the late case of Kerse.”

On the Session Papers MR. ELPHINSTON has written,—“ The Court were unanimously, except Monboddo, of opinion that the interlocutor ought to be altered in so far as complained of by the petitioner. It was held that the annuities and debts, except the £2000 debt, were not real burdens on the lands, but only personal burdens affecting the disponee, and this, it was thought, clearly appeared from the terms of the deed of entail, which, though it burdened the person taking the estate, made not annuities or debts real burdens, and therefore such personal debts could not lessen the terce. It was said it might be that the entailer's intention was to make his debts and the annuities real burdens, but that would not do. Whether a debt was a real burden or not on lands, was not a *quæstio voluntatis*, but must be determined upon the legal import of the deeds, whatever appeared to be the intention of the parties. The argument of the pursuer, founded upon the decision, Thomson v. Douglas, Heron, and Company, 15th November 1786, it was

MS. Notes,  
Elphinston's  
Session Papers.

STEWART  
v.  
HOOME.  
1792.

thought was not well founded, and had been thoroughly considered in the late case of Kerse and Kincraigie, where, what is said in the decision, November 1786, as to an adjudger taking *tantum et tale*, was explained and held to be erroneous; and in that case Lord Monboddo himself came to be of that opinion. Therefore the Court in present case altered the interlocutor as prayed for by the petition. It was held by the Court that the annuities or debts, except the £2000 debt, could not have affected a purchaser or adjudger, and of consequence were not real burdens that could defeat the widow's terce."

MS. Notes,  
Sir Hay Camp-  
bell's Session  
Papers.

On the Session Papers LORD PRESIDENT CAMPBELL has written,—“The burden is not real but only personal in the heir. Not a *questio voluntatis*.”

LORD JUSTICE-CLERK MACQUEEN.—“The annuities, &c., in question, are clearly personal, and not real burdens, and the interlocutor wrong. Engrossing in the infetment may save from prescription, but will not make them real.”

On the margin, in reference to the plea of “*Tantum et Tale*,” LORD PRESIDENT CAMPBELL writes,—“See the late case of Ross of Kerse's creditors, where this doctrine was exploded.”

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V.—MARTIN v. PATERSON.

June 22, 1808.

NARRATIVE.

In 1785 Joseph Mundel executed a disposition of his landed property in favour of his nephew, William Johnston, under burden of the sum of £800, payable to his trustees, to be applied by them in terms of the trust. The deed declared, “that the said William Johnston, and his foresaids, by their acceptation, shall be bound and obliged to make payment to Thomas Goldie and John Gordon, trustees appointed by me, of the sum of £800 sterling, to be by them applied in terms of a trust right and conveyance, executed by me in their favour.” The deed farther declared, “that these presents are granted by me with the farther burden of the payment of the sum of £200 to each of the children lawfully procreated of the body of the said William Johnston surviving him.”

The precept ordained sasine to be given to the disponee, "but always with and under the burdens, provisions, and conditions before specified, which are hereby appointed to be engrossed in the infeftments to follow hereupon." Infeftment followed upon the precept in the person of the disponee, and in the instrument of sasine, the disposition and precept in the terms and under the burdens above mentioned, were engrossed at length.

MARTIN  
v.  
PATERSON.  
1838.

Mr. Johnston granted a liferent to his wife over a certain part of the lands in which she was infeft *propriis manibus*.

The pursuer, to whom Mr. Mundel's trustees had conveyed their right to the security held by them, led an adjudication against the heir of William Johnston, and brought an action of mails and duties, in which he and his mother and the tenants were called as parties, and he insisted that the sums contained in Mundel's disposition were real and preferable burdens.

PLEADED FOR THE PURSUER.—The law requires no *voces signatæ*, no specific formula of words, to constitute a real lien. Nothing more is necessary than that there should be an unequivocal declaration of the disponent's will that the burden should be real, and that proper intimation should be made to the lieges of its existence. This last requisite is effected by the burden being inserted in the investiture. The appointment that the burdens should enter the infeftment would serve no purpose, if the obligation was intended to be merely personal. The clause appointing the burden to enter the infeftment, furnishes of itself sufficient evidence of the disponent's intention that the burdens so appointed to be engrossed there were to affect singular successors, or which is the same thing, to affect the lands themselves.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE DEFENDER.—The specification of a burden either in the dispositive clause or in the procuratory, will not constitute a real lien. The burden must be so conceived that the infeftment of the disponee becomes in effect the infeftment of the person in whose favour the burden is created. In the present case the words used do not extend beyond a personal obligation. There are no words that create a real burden.

ARGUMENT FOR  
DEFENDER.

MARTIN  
v.  
PATERSON.  
1808.

The term burden is used, but the clause containing that term must be explained by the preceding clause. That clause showed that it was merely a personal burden.

LORD CRAIG, Ordinary, “Decerned in terms of the libel.”

JUDGMENT.  
March 4, 1808.

The defender having reclaimed, the Court “Altered, and preferred the petitioner upon her infetment produced to the rents in question in the hands of the tenants.”

JUDGMENT.  
June 22, 1808.

The pursuer having reclaimed, the Court “Adhered.”

OPINIONS.  
MS. Notes,  
Baron Hume's  
Session Papers.

LORD NEWTON observed,—“This is an instance of both a personal and real burden. If the deed had stopped at first part, it would have been personal. But the latter clauses make it clearly otherwise. If not so, I must give up all pretension to knowledge of such matters.”

LORD MEADOWBANK observed,—“If my brother had written the deed he would have used the words, real burden. The words here used first creating the obligation, are purely and properly personal. They are conceived all of them with relation to the debtor's person and not to the lands. Insertion of them in the sasine makes no difference. Personal burdens may be inserted there as well as anywhere else. If in its nature and conception the burden is personal, insertion there will not mend it. The addition of the general words *burdens* don't alter it, for still it is a personal burden.”

LORD CRAIG observed,—“I am still for returning to my own interlocutor which I pronounced, understanding the law to be that where a right is granted under the *burden*, and that is ordered to be inserted in the seisin, this made it a real burden. The case of Cameron, in my opinion, is a strong authority that way. It was so settled some years ago. If this interlocutor be adhered to, I must alter my notions on the subject entirely.”

LORD PRESIDENT CAMPBELL.—“It is not the word *burden* alone that is to be considered. The burden is ‘to make payment,’ conceived as a personal burden. If the word *burden* makes it real, the words *provisions and conditions* would also make it real. As to the seisin, it does not bear the particular

burdening *sums*, which any skilful writer would have *inserted*. It bears nothing but the general words, *burdens* and provisions, which carry us back to the former part of the deed expressing these burdens, and where they are personal. The case of Cameron is a precedent in point."

MARTIN  
C.  
PATERSON.  
1808.

LORD JUSTICE-CLERK HOPE.—"In every settlement funeral charges and the granter's debts are always made conditions of the deed. But does any one suppose that these are real burdens?"

LORD ARMADALE.—"There are not words here to make the burden real. No precise form requisite. But we must see the thing sufficiently and clearly done."

LORD GLENLEE.—"We must attend to the burdening clause itself. If that is conceived personally, insertion in precept and procuratory will not mend it. It is just the case mentioned by Erskine."

LORD NEWTON.—"I don't insist on any peculiar form of words. But if I dispose lands under the *burden* of such a sum, and order that sum to be inserted in the seisin, that makes it real."

In the Faculty Report it is stated,—"A majority of the Court differed in opinion from the Lord Ordinary, and observed, that, without requiring any technical form of expression for the constitution of a real lien, it is necessary that the intention to impose a burden on land by reservation should be expressed in the most explicit, precise, and perspicuous manner. In a clause by which onerous singular successions are to be affected, there must be no room for ambiguity; but the present instance admits of a doubt, and therefore the obligation in favour of Mundel's Trustees ought not to be held as constituting a real burden in competition with Mrs. Johnston's infetment."

Faculty  
Collection.

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1. In PLACE v. M'NAB'S TRUSTEES, February 24, 1821, Francis M'Nab of M'Nab conveyed his estate to his nephew Archibald, "under burden of the payment of the whole just and lawful debts, both heritable and movable, due by me at the date hereof, of which

debts, so far as known, a list has been made up and subscribed by me as relative hereto, amounting to £34,922, 13s. 8d." The debts were declared to be a real burden, and appointed to be engrossed in the infestment. Subjoined to the disposition, and recorded along with it, was the list containing the names and sums. Archibald was infest on the disposition, and the instrument of sasine bore that infestment had been given "under the burdens, provisions, and declarations before specified, and no otherwise." Archibald afterwards executed a trust-deed, under which his trustees sold the estate, and the purchaser suspended the payment of the price until it should be decided whether the debts in the list were real burdens.

2. PLEADED for the trustees. The disposition burdens the lands with a slump sum of £34,922, 13s. 8d., but it contains no special enumeration of the amounts of the several debts of which this sum consists. Nor does it mention the name of any person who is creditor therein. This is attempted to be supplied by referring to a list stated to have been made up and subscribed by the disponent. But a list not incorporated in the disposition forms no part of the investiture. The burden, therefore, is not made specific in the manner required even in the first step of the disponent's title. Again, the infestment goes no further than the terms of the disposition. It states only the general amount of the burden, but it does not state the creditors' names, nor the

amount of the individual debts. It only refers to the list said to have been prepared as relative to the disposition. The infestment entered the Record of Sasines, but the list was not put upon record. The burden, therefore, is not specified in the infestment, nor in the Register of Infestments. If, therefore, the burden had been specific in the disposition, it would not have been a real burden, because there was no specification where alone creditors or purchasers are called upon to go, in order to ascertain the state of the titles of the lands, in reference to which they are transacting. The former decisions of the Court were corrected by the House of Lords, and their judgments of reversal established the principle that no perpetual unknown encumbrance ought to be created on lands. There must be a distinct specification of the burden, and this cannot be accomplished except by stating explicitly the creditors' names, and the amounts of their debts. To state merely the names of the creditors would leave the amount of the burden unknown. To state the general amount merely would also be insufficient, because there would be no means of discovering the creditors, or of learning whether the burden continued in force, or had been paid off. The burden must therefore be specific both in the amount and in the creditor's name. The specification must also enter the infestment, and so go upon record. The object of the records is to give a complete security in regard to land-rights. It is there-

fore an established rule that no burden can be established on a feudal right which is not expressed in the infestment which by means of the records is published to all the world.

3. The purchaser PLEADED,—The declaration of real burdens is inserted as a qualification of the dispositive clause, declaring always, as it is hereby expressly provided and declared, that the said lands *are hereby disposed under the burden* of the payment of the whole just and lawful debts, and which debts are hereby declared a real burden, affecting the said lands, aye and until complete payment thereof, and which burden is appointed to be engrossed in the infestments to follow hereon. In the seisin which passed on the disposition, the clauses regarding the real burden were specially engrossed, and the precise amount of the debts contained in the list being £34,922, 13s. 8d., was declared to be the amount of the real burden. The infestment so qualified was perfectly sufficient to constitute these debts a real burden on the estate, as being specially mentioned both in the disposition and the infestment. The Court held “That the debts of Francis M’Nab had not been duly established as real burdens on the lands.”

4. In the case of MACINTYRE v. MASTERTON, February 3, 1824, a party conveyed his lands to his grandson with and under the burden of the payment of all his just and lawful debts, and also with and under the burden of the payment of certain sums of money to the parties therein named. The

conditions were appointed to be engrossed in the infestment to follow upon the conveyance, and sasine was accordingly taken under burden of these conditions. In a question, whether the burdens were real, LORD ALLOWAY, Ordinary, “Assoilzied the defender in respect of the decision of Martin v. Paterson, 22d June 1808, which is similar to the present case; and in respect that although the lands in question are conveyed under burden of the payment of the grantor’s just and lawful debts, and also under burden of the payment of the sums of money therein mentioned, and now claimed by the pursuer, yet the same are not distinctly and expressly declared a real burden on the lands.” The pursuer having reclaimed, the Court “Adhered.” LORD PRESIDENT HOPE observed,—“The dispositive clause conveys the lands ‘under the burdens,’ &c., after expressed, and they are directly disposed ‘with and under the payment of the sum of money following.’ The lands, and not the disponent, are the antecedent; and then the obligation to infest, the precept of sasine and the procuratory are all under the same burden. I think, therefore, that this debt was constituted a real burden, and that it is not in the same position as the debt in Martin’s case, where the antecedent was the disponent.” LORD GILLIES observed,—“I cannot distinguish this case from that of Martin. In no part of the deed is the sum declared a real burden.” LORDS SUCCOTH and HERMAND concurred with LORD GILLIES.



5. In reference to real burdens LORD STAIR observes,—“All the clauses contained in infeftments are not real burdens affecting singular successors, such as warrandice, which only obliges the warrantor and his heirs, and is merely personal; so then the difficulty remains, what clauses inserted in infeftments are real burdens effectual against singular successors. If the infeftment bear a provision that the person infeft shall pay such a sum or do such deeds to a third party, this will import but a personal obligation, and will not affect singular successors. But the dispositive clause being expressly burdened with payment of such a sum, or bearing, ‘that upon that condition the infeftment is granted, and no otherwise,’ such a clause was found effectual against a singular successor, bearing only a provision in the dispositive words, ‘that the lands should be affected with such a sum,’ which was sustained against an opposer.”—*Stair*, 2, 3, 54 and 55.

6. “All real burdens of lands contained in infeftments, though they give no personal right to those in whose favour they are conceived, nor can it give them any fee of the lands, yet they are

real burdens passing with the lands to singular successors, though they bind them not personally, but the ground of the land, by apprising or adjudication, as if lands be disposed with the burden of an annualrent to such a person and his heirs. This will not constitute the annualrent, but may be the ground of adjudging an annualrent out of the lands. In all these cases purchasers by voluntary disposition are presumed, and ought to see their authors’ rights at least a progress of forty years, whereby they may know such clauses and consider them in the price, or otherwise secure themselves against them.”—*Stair*, 2, 3, 58. “If an infeftment be granted with the burden of a sum, it makes that sum a real burden, whereupon the fee may be appraised or adjudged, and the apprising or adjudication thereon will be preferred as of the same date with the infeftment burdened; whereby a purchaser proceeds on his own hazard if he buy without sight of his author’s infeftment, and if he but get sight as a creditor, the party having right to the sum burdening will be preferred as an anterior real creditor, and not personal only.”—*Stair*, 4, 35, 24.

*A Reserved Real Burden may be effectually constituted in a Procuratory of Resignation ad Remanentiam.*

WILSON v. FRASER.

THE lands of Blackburn were sold by Thomas Douglas to the pursuer, James Wilson. On the disposition granted by Douglas, Wilson was base infest. He afterwards resold the lands to Douglas, and reconveyed them to him by a disposition containing a procuratory of resignation *ad remanentiam*, but under the burden of £11,000, which was declared to be a real burden on the lands. The procuratory was duly executed, and the instrument of resignation recorded. Douglas then sold the lands to the defender, who afterwards disputed the pursuer's right to attach the lands, on the ground that no real burden had been created on the lands. The pursuer, accordingly, brought an action of declarator to have his right declared.

April 15, 1824.

NARRATIVE.

PLEADED FOR THE PURSUER.—Although, strictly speaking, a resignation *ad remanentiam* extinguishes the feu held by the vassal, yet the property does not return to the superior as he originally gave it out. On the contrary, it returns with all the burdens created by the vassal. A resignation *ad remanentiam* is truly nothing else than a transference of the property from the vassal to the superior, differing in no other respect from any other transference, except in the mode of completing the title. The difference consists in this, that instead of there being a disposition and precept of sasine, followed by an instrument of sasine, there is a procuratory of resignation followed by an instrument of resignation, which is recorded and published like an ordinary instrument of sasine. In substance, therefore, there is no distinction between a burden created by means of an instrument of resignation, and by a sasine.

ARGUMENT FOR PURSUER.

PLEADED FOR THE DEFENDER.—A resignation *ad remanentiam* is the form in which a vassal returns his lands to the superior. It has merely the effect to extinguish the right of

ARGUMENT FOR DEFENDER.

WILSON  
v.  
FRASER.  
1824.

the vassal, and thereby to enable the superior to possess his lands without that burden. It is impossible, therefore, consistently with feudal principle, to create and constitute a real burden or lien by means of such a resignation. It is no doubt true, that on receiving a resignation *ad remanentiam*, the superior must take it subject to all the pre-existing burdens established by the vassal over the feu ; but no instance has occurred, nor has any sanction been ever given to the creation of a real burden, by means of the procuratory of resignation itself. As the burden in question did not exist on the lands prior to the granting of the procuratory of resignation, and as that resignation could only have the effect to reconvey to the superior the *dominium utile* in the state in which it was before the resignation, no valid real burden had been constituted.

Interlocutor of  
Lord Ordinary.

LORD PITMILLY, Ordinary, Found “ That the pursuer, James Jordan Wilson, has a real lien over the lands of Blackburn for security of the balance of the price due to him, and is entitled to bring the lands to sale for payment of the balance ; and, therefore, in the action of declarator and removing at his instance against the defender, and also in the process for poinding the ground, decerned in terms of the conclusions of the libel.”

JUDGMENT.  
Feb. 13, 1822.

The defender having reclaimed, the Court “ Adhered.”

JUDGMENT.  
House of Lords,  
April 15, 1824.

The defender having then appealed to the House of Lords, “ It was Ordered and Adjudged that the appeal be dismissed, and that the interlocutors complained of be affirmed.”

OPINIONS.  
Shaw's Ap-  
peals, vol. ii.  
p. 168.

LORD GIFFORD observed,—“ Undoubtedly the important question in this case is, Whether the Lord Ordinary in this case, and subsequently the Court of Session, have come to a right conclusion, in affirming that Mr. Wilson had a real lien over the lands of Blackburn for security of the balance of the price due to him, and entitled in consequence to bring the lands to sale for the payment of the balance in the action of declarator ? And undoubtedly, my Lords, this case involves a question of some nicety, and some subtlety in Scotch conveyancing. My Lords, I have stated to your Lordships that it

WILSON  
v.  
FRASER.  
1824.

appears to be distinctly admitted, and I think will not be doubted, that this bargain would have been clearly valid and effectual against a third person, had this resignation been, in the language of the Scotch law, a resignation *in favorem*; there can be no doubt that this burden would have been well created on these lands. I say, not only has this been admitted, but it appears to me, on reference to the writers of the law of Scotland, that no doubt could be entertained upon that subject. My Lord Stair, I think, seems to be precise on that subject, in Book iv. tit. 35, § 24, in which he says, that ‘if an infeftment be granted with the burden of a sum, it makes that sum a real burden;’ and the same is laid down in Mr. Erskine’s Institutes, and in his Principles, in more than one place.

“My Lords, however, it is said in this case, that this burden cannot be created by a resignation *ad remanentiam*; and I will just state to your Lordships what a writer on the law of Scotland defines a resignation *ad remanentiam* to be. Lord Stair, in Book ii. tit. 2, § 1. (Here his Lordship read the passage.) Then he states afterwards the Statute of 1669, ‘whereby instruments of resignation are null if not registrate within sixty days,’ &c. Then he states the effect of this resignation.

“My Lords, the instances put by Lord Stair are instances of burdens created before the resignation *ad remanentiam*, and therefore a distinction has been taken at the Bar, and very powerfully argued, that you cannot, in the same instrument, at the same time when the resignation *ad remanentiam* takes place, create the burden; for that the effect of this resignation *ad remanentiam* is not the transmission of the right, but an extinction of the right, which becomes consolidated with the superiority in the hands of the superior.

“My Lords, in Mr. Erskine’s Principles he states the effect of the resignation *ad remanentiam* in the words I will read to your Lordships. (Reads.) So that he says that the effect of the resignation *ad remanentiam*, as it respects the superior, is, that no sasine is necessary, and the effect of it is to consolidate the property which the vassal receives with the superiority, and therefore to extinguish the minor right; and therefore Mr. Erskine says, ‘that resignations *ad remanentiam* are truly extinctions, not transmissions, of a right;’ but then undoubtedly

WILKINSON,  
KILGOUR,  
JAMES.

it is a qualified extinction, for he goes on to state, that it would not have the effect of extinguishing any real burden which may have been created by the vassal, Book ii. tit. 5, § 35 ; and he says, ' This sort of resignation was not ordained to be recorded by the Act 1617 for registering real rights, which omission, because it weakened the security of singular successors, is now supplied by the Statute 1669.'

" It seems, therefore, from these passages I have read to your Lordships, that according to the principle of the law of Scotland, as I understand it, in these resignations *ad remanentiam* those burdens are effectual against a superior which would have been effectual against a singular successor ; and the only question, and, as I have stated, one of considerable nicety, is this, Whether such a real burden can be created by an instrument of resignation *ad remanentiam*? or, Whether it must be created before ? If created before, there is no doubt upon the subject, because undoubtedly, by the passage I have cited to your Lordships, it would be effectual. Now, my Lords, on the best consideration I can give to this case, and seeing, as I do, that such a burden as this would be clearly effectual against a singular successor on a resignation *in favorem*, I must confess it does appear to me, that, according to the principles of the law of Scotland, this was a real burden effectually created upon this land against the purchaser ; and, my Lords, undoubtedly that was the clear opinion of the Lord Ordinary before whom the case was heard, and it was the unanimous opinion of the Second Division of the Court of Session, on a review of that decision, and on a consideration of the principles to be extracted from the passages from my Lord Bankton and Sir George Mackenzie passages cited in the appeal papers which have been so fully commented upon at your Lordships' Bar, that I have not thought it necessary to trouble your Lordships with them. Upon these authorities the Court of Session were of opinion this was a real burden, and effectually created ; and a passage was referred to in a work of considerable authority in the law of Scotland I mean Mr. Ross's Lectures on Conveyancing, in which, ~~undoubtedly~~, it appears to be his opinion, and is ~~disputed~~ stated as such, that such a burden as this is would be ~~effectual against the superior~~, and my Lords in point of con-

venience, one cannot see the least objection to this. This burden occurs in the instrument of resignation to Mr. Douglas. It must appear, therefore, to every person who took the trouble, as it is the practice of that country to register records under the Statute of 1669, to make reference to that record, that this estate had been surrendered to the superior with this qualification ; and undoubtedly it was competent to any person treating with this superior, to make any agreement which he thought fit with respect to the terms on which he meant to resign the property to him ; and though necessarily we could not get at what we might conceive the justice of the case, if the appellant could succeed in showing that this has not created a real lien on the lands, and that therefore Mr. Wilson, in this form, had no right to bind the lands with it, yet upon the whole it appears to me, as I have already stated, that the lien is well created. Undoubtedly it is a case of great intricacy, and great nicety, one of which I have heard no express decision cited at your Lordships' Bar, and in which, therefore, we are bound to refer to the principles on which these instruments are framed, and the principles of the law of Scotland : and on the most attentive and anxious consideration of a case which, to a person more versed in English law, is of considerable nicety and difficulty, upon the whole it does appear to me, that the Lords of Session have come to a right conclusion, and that therefore this interlocutor ought to be affirmed."

WILSON  
v.  
FRASER.  
1824.

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*A Reserved Real Burden is carried by a General Service.*

CUTHBERTSON v. BARR.

IN 1801 Thomas Cuthbertson sold the lands of Boreland to the defender for the sum of £2500. The defender was allowed to retain £1900 of the price for a year ; and accordingly this sum was declared in the disposition granted to him to be a real burden on the lands. The defender at the same time, along with a cautioner, granted a personal bond for the sum to Cuthbertson.

March 7, 1806.  
NARRATIVE.

**CUTHBERTSON**      Before any part of this sum retained was paid, Cuthbertson  
                                  <sup>v.</sup>  
                                  **BAER.**  
                                  1806.  
 died. His eldest son Robert made up a title by general service as heir to his father, and upon this title raised an action against the defender and his cautioner for payment of the sum contained in the bond. To this action the defender objected, on the ground that the pursuer's title was defective.

**ARGUMENT FOR**      **PLEADED FOR THE DEFENDER.**—A general service conveys  
**DEFENDER.**      only personal rights. Under this description the right reserved in the disposition granted by the pursuer's father does not fall. In virtue of the reservation contained in that deed, the pursuer's father remained infeft in the lands to the extent reserved. In order to be able, therefore, to discharge the reserved real burden, the pursuer must expedite a special service to his father.

**ARGUMENT FOR**      **PLEADED FOR THE PURSUER.**—There are two classes of real  
**PURSUER.**      rights which pass by general service—those which do not require infeftment, and those which are secured by an infeftment not standing in the person of the ancestor or creditor, but in the person of another, as debtor in the obligation. This latter class comprehends all real liens by which infeftments are encumbered, but which are not themselves feudalized in the person of the creditor.

A person in whose favour a real burden is conceived has no fee in the lands. He has no title of possession, and no access to the rents for payment of the burden. Nor does it make any difference in the question, that the party in whose favour the real burden is conceived was the granter of the disposition by which the burden was reserved. The original infeftment of the granter does not subsist contemporaneously with the infeftment of the disponent. The right reserved is a mere burden on the disponent's right of property. No feudal right remains in the person of the disponent. He cannot vote for a member of Parliament. He has no title of possession to the lands. He cannot pursue an action of mails and duties. He has no distinguishing privilege of a proprietor more than if the right had been reserved to him in the disposition of a third party.

In practice it has always been held by men of business that a general service is sufficient to carry a reserved real burden.

LORD METHVEN, Ordinary, Found "That the title to the debt in question is quite sufficient for enabling the tutors of the pursuer to discharge the same."

CUTHBERTSON  
v.  
BARR.  
1806.

The defender having reclaimed, the Court "Adhered."

JUDGMENT.  
March 7, 1806.

On the Session Papers LORD PRESIDENT CAMPBELL has written,—“Title to heritable debt. Heir ought regularly to make up titles by precept of *clare constat* from the superior of the infestment, *i.e.*, Denny the purchaser, and then grant a discharge and renunciation, to be recorded in the Register of Sasines, in order that it may appear in the face of the record that the lands are disencumbered. At same time it is believed a general service is thought sufficient. But at least it should be a general special service.”

OPINIONS.  
MS. Notes, Sir  
Hay Campbell's  
Session Papers.

On the Session Papers BARON HUME has written,—“The President at moving was strenuous for a special service, on the notion of the seller having in substance reserved so far his original infestment. But at advising he gave up this and contented for a general special service, which, however, seems to be unknown, except in service as heir of provision where the specification of the deed of provision, if made, limits the application of the service.”

MS. Notes,  
Baron Hume's  
Session Papers.

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*A Reserved Real Burden is transmissible by Assignment.*

BROWN v. MILLER.

IN 1795 Robert Lyle conveyed to his eldest son certain heritable subjects under burden of payment of £100 to each of the younger children, and under burden of a liferent provision to his widow. These provisions were declared to be real burdens on the subjects conveyed, and were appointed to be engrossed in the infestment. On the death of his father, John Lyle was infest, and the instrument of sasine bore that infestment was

Feb. 8, 1820.  
NARRATIVE.



BROWN  
v.  
MILLER.  
1820.

given under burden of the provisions contained in the dispositive clause in the disposition in his favour.

In May 1801, Margaret Lyle, one of the daughters, along with her husband, William Term, having borrowed £60 from James Cameron, assigned, disposed, and conveyed to him the provision of £100, secured to her by her father's deed of settlement. The deed in favour of Cameron set forth that the provision was constituted a real burden and lien on the subjects conveyed by the deed of settlement, and the real burden constituted over these subjects, and also the subjects themselves, were conveyed to Cameron. The conveyance was thereafter duly intimated to John Lyle on 15th May 1801, who signed a formal and duly attested acknowledgment of the fact on the back of the assignation. The assignation was also, on 7th August following, duly recorded in the Register of Sasines.

In 1804 John Lyle sold part of the subjects to the Rev. Thomas Brown. In order to effect the sale, Margaret Lyle and her husband granted a discharge to John Lyle of the provision of £100, and renounced and released the subjects of all claim they might have held in them in virtue of her father's disposition and settlement, and declared the subjects to be completely free and disencumbered of all claims at their instance in all time coming. Some years after, John Lyle sold the remaining subjects to Alexander Hyndman; and on this occasion a similar discharge was granted by Margaret Lyle and all the younger children. Hyndman soon after died, leaving three infant children, for whom Robert Miller was appointed factor *loco tutoris*.

In 1813 James Cameron, to whom Margaret Lyle had assigned her provision, adjudged both the subjects, on the ground of Margaret Lyle's debt to him, and her intimated assignation to him of the real burden which was established by her father's settlement in her favour. In this process the Rev. Mr. Brown, who had purchased the subjects in Greenock, and the children of Alexander Hyndman, who had purchased the subjects in Gourrock, were called as parties. Brown allowed decree to pass in absence. But a litigation ensued with Hyndman's heirs.

LORD CRAIGIE, Ordinary, Found "That Margaret Lyle's claim



and interest, though created into a real burden, was duly and effectually transferred to Cameron by her intimated deed of assignation; and he therefore decerned in the adjudication."

BROWN  
v.  
MILLER.  
1820.

Miller, the factor *loco tutoris* of the children of Hyndman, then made payment of Cameron's debt, and took an assignation in his own right. Having obtained a charter of adjudication, and been infest, he brought an action of mails and duties against Brown, in which decree was obtained by Miller. Brown then brought an advocacy of the Sheriff's judgment, and also raised a reduction of the decree in the adjudication.

PLEADED FOR THE PURSUER.—The right which Margaret Lyle had in the subjects was not personal, but real. As soon as infestment was obtained by her brother, her right in the lands was completed. His infestment served both to realize her interest and his. Her brother was unable to divest himself to her prejudice by any form of conveyance. By his infestment the lands were as much impledged as by a right in security. In both instances an adjudication is necessary to give ready access to the rents, but it is not necessary for the purpose of realizing the right. The right is realized by the infestment.

ARGUMENT FOR  
PURSUER.

As infestment was requisite for the completion of the right, infestment was equally requisite for its transmission. According to feudal principle the right could not pass without infestment. It could not otherwise appear in the records whether the burden was subsisting or extinguished; or if subsisting, through what hands it had passed, or in whom it was now vested. The form of intimation is inapplicable to such a right, and serves no useful purpose, for the burden is a debt of the lands, and not of the owner.

By an intimation to John Lyle, the original disponent, a purchaser from him does not learn who is now the creditor in the claim, or to whom he may safely pay. In the present instance, it is true, the personal deed found its way into the Record of Real Rights. But Mr. Brown was not obliged to search for it, and in point of fact, he did not see it there. Indeed, under the Statutes there was no authority for receiving there any deed of that description.

BROWN  
v.  
MILLER.  
1820.  
ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—The right of Margaret Lyle was not a feudal estate in her person, but a burden only on the infestment of her brother, the debtor. The whole and entire fee of the lands was his, and no fee of any sort, higher or lower, was in her. She required no infestment, and she had none, and could obtain none, in her own person. She had no title of possession, or power to bring an action of mails and duties against the possessors of the lands. She could only, as a real creditor, use a diligence of poinding the ground; and in the event of her death, her interest would have passed by a general service, and could not have been the subject of special service, or precept of *clare constat* and infestment. *Inter vivos*, her interest was therefore transmissible by an intimated deed of assignation, more especially if recorded. If not transmissible in that form, it must have been utterly inalienable, since not being infest herself she could not grant any effectual warrant for infesting another. In that respect, her right was of the same quality as a reversion, which is a real burden on the wad-setter's infestment, and passes by deed of assignation, which becomes effectual against third parties by entry of the deed on record. It resembles also a faculty to burden, which, if special as to the sum and the creditor's name, is duly exercised by the granting of a personal bond even in his favour. The like law has even been applied to real burdens in the person of a seller of land who had formerly been infest in the fee.

Farther, if Margaret Lyle's interest was not transmissible by her deed of assignation, as little could it be extinguished by her writ of discharge, which is merely such, and does not even contain any dispositive words, such as are to be found in the assignation.

Interlocutor of  
Lord Ordinary,  
Nov. 19, 1818.

LORD GILLIES, Ordinary, pronounced the following interlocutor :—“ Finds, that John Lyle, vintner in Greenock, succeeded to certain heritable subjects, situated partly in Gourrock and partly in the town of Greenock, in virtue of a disposition and settlement executed by his father, whereby the said John Lyle was taken bound to pay certain provisions to his younger brothers and sisters, and in particular, the sum of £100 to his sister Margaret : Finds, that by said disposition the provisions

to Margaret and to the younger children were declared to be heritable burdens upon the subjects thereby conveyed to John Lyle, and agreeably to the directions therein contained, were accordingly engrossed in the instrument of sasine which followed upon the disposition in favour of John Lyle : Finds, that after infestment had been taken upon the disposition, Margaret Lyle, in the year 1801, granted an assignation of the sum so provided to her by her father's settlement in favour of James Cameron, in security of a bill due to him ; which assignation was duly intimated to Lyle, the debtor, and recorded in the Register of Sasines : Finds, that although the said assignation was effectual to convey a personal right to Margaret Lyle's provision, yet that the same was not a habile or effectual method of conveying the heritable right which, previous to this period, had been perfected by infestment, as above mentioned : Finds, that said heritable right not being cancelled or transferred, or at all affected by the said assignation, could still be effectually discharged : Finds, that in 1804 the memorialist, Mr. Brown, purchased from Lyle the subjects situated in Greenock, when, in order that these subjects might be disencumbered of the provisions before mentioned, Margaret Lyle, and her brothers and sisters, granted a discharge and renunciation of the real burdens created over the intended purchase, but reserved their rights entire over the subjects in Greenock, which still remained the property of Lyle : Finds, that this disposition, with the clause of reservation, having been recorded, Mr. Brown paid the full price of the subjects, amounting to £1120 sterling, and received a disposition to the same, upon which he was duly infest : Finds, that in virtue of this disposition Mr. Brown entered into and continued in possession without challenge, or any claim being made against him, down to the year 1813, when a process of adjudication was raised against him, and also against the other memorialist Alexander Miller, as purchaser of the subjects in Greenock belonging to John Lyle ; which adjudication was brought at the instance of James Cameron, and was founded on the assignation before mentioned, granted to Cameron in 1801, as being preferable to the discharge obtained by Mr. Brown in 1804 : Finds, that in the process of adjudication appearance was made for Mr. Miller, and decree passed against

BROWN  
T.  
MILLER.  
1820.

BROWN  
v.  
MILLER.  
1820.

him, but that no appearance was made for the memorialist Brown ; and that therefore *quoad* him the decree therein contained must be held to be in absence : Finds, that Mr. [ ] having, in consequence of the said decree, paid the debt to James Cameron, and obtained right to the adjudication, brought in virtue thereof, a process of mails and duties before the Sheriff of Renfrewshire, whose interlocutor having been complained of by both parties, in mutual advocations, which have been joined with the present process of reduction, at the instance of Mr. Brown, for setting aside said decree of adjudication : Finds, that in the reduction, as well as in the action of mails and duties, Mr. Brown is entitled to found on the discharge formerly mentioned, as being effectual to protect him from any claim on the instance of Cameron, or any person deriving right from him (Cameron) to the assignation by Margaret Lyle as mentioned : Therefore, in the reduction sustains the reasons for reduction, and reduces, decerns, and declares, conform to the conclusions of the libel, and in the mutual advocations of process of mails and duties, advocates the cause, and assigns the defender, the said Rev. Thomas Brown, from the conclusions of the libel in said action of mails and duties decerns."

JUDGMENT.  
Feb. 8, 1820

The pursuer having reclaimed, the Court pronounced the following interlocutor :—"The Lords having resumed the consideration of this petition, and advised the same with their answers, they find that the real burden or security created on the subject in question, in the person of Margaret Lyle being clothed by infestment in her person, nor capable of being validly transferred by her and her husband by disposition and assignation in favour of James Cameron, intimated and recorded in the Register of Sasines ; and such disposition and assignation is effectual and preferable to the discharge and renunciation founded on by the respondent and therefore alter the interlocutor of the Lord Ordinary claimed against ; and in the process of reduction at the instance of the respondent Thomas Brown, sustain the defences of the petitioner, assoilzie him from the conclusions thereof decern. In the mutual processes of advocacy, advocate

causes ; and in the advocation at the instance of the respondent, repel the reasons of advocation, assoilzie the petitioner from the conclusions thereof, and decern. And also in the other advocation, sustain the reasons of advocation, and decern against the respondent Thomas Brown, conform to the conclusions of the petitioner's original libel of maills and duties before the Sheriff ; and farther, find the respondent liable to the petitioner in payment of the full expenses incurred by him, both before this Court and the inferior Court ; appoint an account thereof to be given in, and remit the account, when lodged, to the auditor to tax the same, and to report."

BROWN  
v.  
MILLER.  
1820.

LORD BALGRAY observed,—“ There is here a proper real burden, both by the form of words and the entry on record. But the creditor's interest is of an heritable not a feudal nature. It passes therefore by assignation, as it also does by a general service. A precept of sasine would have been incompetent, for the creditor had no feudal interest in his person to convey. Any other decision would be dangerous to the law. The purchaser cannot complain, for if he had gone to the records he would have seen the real burden, the sum, the creditor, and the assignation. The case of *Lamont v. Lamont's Creditors*, 4th December 1789, is a judgment in point.”

OPINIONS.  
MS. Notes.  
Baron Hume's  
Session Papers.

1. In the case of *LAMONT v. LAMONT'S CREDITORS*, December 4, 1789, Mr. Lamont, by disposition and settlement, conveyed his lands of Auchogyle to his nephew Archibald, failing heirs-male of his own body, but under burden of the sum of £100 to each of the testator's sisters. These sums were expressly declared to be real burdens on the lands until paid. No infetment followed on the disposition, and Grizel Lamont, one of the sisters, by her “ last will and testament,” bequeathed to Amelia,

her youngest sister, all her “ goods and gear” which she then had, or might happen to have “ at any future period” of her life. The deed further, after narrating that she had reason to believe that her brother had burdened his estate with a sum of money to be paid to her, proceeded thus, “ I therefore hereby declare, by this my last will and testament, the said Mrs. Amelia Robertson, my sister, to be my sole heir, executor, and ASSIGNEE.”

2. In a ranking and sale of the

lands of Auchogyle, Mrs. Amelia Lamont claimed both the £100 left to herself by her brother and also the £100 left to her by her sister Grizel. The creditors of Archibald Lamont, the disponent, objected, *first*, That as no infeftment followed on the disposition in Archibald's favour, the provisions to the three sisters were not entitled to be preferred to the creditors of the disponent; and, *second*, That if these provisions were to be held as real burdens on the lands, then the provision to Grizel could not be carried to her sister Amelia by the testament executed by her.

3. The common agent held that the provisions to the three sisters were to be preferred to the claims of the creditors of the disponent, and his report bore, "Though no infeftment followed on the disposition, the provisions to the sisters are entitled to a preference as being decerned real burdens on the lands, and a condition of the right and the after adjudication could only carry the personal right which was in him a conditional right, subject to the burden of these provisions." In reference to this part of the common agent's report, BARON HUME on the margin of the Session Papers has written,—“This is the just view. They are not *real* on the lands from want of infeftment, but preferable as qualifications of the debtor's own right.”—*MS. Notes, Baron Hume's Session Papers.*

4. The Court repelled the objections to Mrs. Amelia Lamont's claim. LORD DREGHORN observed,—“I am for repelling the objection. The debtor's right continued personal, and was therefore qualified by the burden of the provisions. The creditors behoved to take their debtor's right, such as it was, *cum suo onere*. And if their infeftment was to follow on that right, the provisions also behoved to be qualities of that infeftment. As to confirmation there was no need of it, because the sum was specially assigned. I think Grizel's share was moveable, though secured upon the estate, and therefore I think that Grizel's deed, though testamentary, conveys it.” LORD PRESIDENT CAMPBELL observed,—“I agree, except as to the point of the sum being moveable. I think it is clearly heritable. It would have gone to Grizel's heir had it not been for this deed. But it does not thence follow that the sum is not assignable, and this deed, though Grizel calls it a testament, does constitute an assignee.” LORD JUSTICE-CLERK MACQUEEN observed,—“I agree with the President as to the power of assignation here. The sum was indeed preferable, but it was not feudalized, and is therefore assignable. A procuratory of resignation making a settlement of an estate goes to heirs, but so long as not executed and infeftment taken, it is still assignable. And just so here. If it had been an heritable bond with infeftment as a wadset, I should very much have doubted.”

—*MS. Notes, Baron Hume's Session Papers.*

5. On the Session Papers, LORD PRESIDENT CAMPBELL has written,—“*First point*: Archibald Lamont's right qualified. His creditors must take the right as he had it, consequently with the burden of these provisions.—*Second point*: Whether Grizel's share is habilely conveyed by will? The word *assignee* sufficient. Court unanimous that the right is qualified, and that it is an heritable subject, not moveable, transmissible by assignation, and sufficiently

carried by this deed.”—*MS. Notes, Sir Islay Campbell's Session Papers.*

6. In the case of *BROWN v. MILLER*, the assignation was not only intimated, but recorded in the Register of Sasines. It has been doubted whether the recording be essential, and perhaps without a special enactment it is not; but if so, it certainly ought to be required. Without such a publication a purchaser has no means of securing himself against the combined fraud of the seller and the creditor in the real burden.

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## SECTION II.

## RESERVED FACULTY TO BURDEN.

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*Where a Right flowing from the exercise of a Reserved Power to Burden has not been made real in the lifetime of the party in whose favour the power is reserved, the onerous singular successors of the Disponee are not affected by the Right.*

I.—ROME *v.* GRAHAM'S CREDITORS.

Feb. 19, 1719. IN 1629 George Rome purchased the lands of Clowden, and  
 NARRATIVE. took the disposition to his son Thomas in fee, and to himself in  
 liferent, reserving power to himself to dispoise the lands irre-  
 deemably, or to wadset them, or to grant annualrents out of  
 them, notwithstanding that the fee was taken to his son. In  
 1635 he granted a bond to one Ballantine, on which adjudica-  
 tion was led after the death of the father, and also after the  
 lands had been conveyed by the son to an onerous singular  
 successor. The adjudication having come by progress into the  
 person of Thomas Rome, merchant in Antigua, a competition  
 arose between him and the creditors of Provost Graham, who  
 was then the proprietor of the lands.

ARGUMENT FOR  
ROME.

PLEADED FOR MR. ROME.—A party who has a liferent, with  
 a power to dispoise and burden, is in the eye of the law really  
 fiar. His liferent is an *ususfructus causalis*, and his debts  
 affect the subject as much as if the fee had been stated in his  
 person. The creditor of such a party requires therefore to do

no more than adjudge the lands from him. From that moment the adjudication is a real right upon the lands, as much as if he had been formally invested in the fee. Nor has it ever been thought that such an adjudication gave the creditor right only to the faculty to burden ; for, upon that supposition, the adjudication could not be effectual upon the lands, without some new deed in exercise of the faculty, such as granting an heritable bond or wadset to himself. But that has never been dreamed or practised by any creditor in such a case, for this plain reason, that a liferenter having a power to burden is always considered with regard to his creditors as *fiar* ; and the right of a son, in whose name the fee is expressly taken, does in such a case resolve into a conjunct fee with the father, and he is understood to be conjoined for no other reason but to save the trouble of a new conveyance, and to exclude the superior's casualties that may fall due by the death of the father. It makes no difference, that the fee was never in the father, but that the faculty was disposed to him by a third party, who at the same time disposed the fee to the son. A father disposing in favour of his son, and reserving faculties, does not convey the fee more, nor in a stronger manner, than a third party, who gives the father the liferent with such faculties, and the son the fee ; and the third party in that case very plainly gives the father as much as he himself reserves. If, indeed, the faculty were only given to the father, without any infestment of liferent, perhaps there might be more ground for looking upon that as personal ; but, where a father is infest in liferent with such faculties, it is equivalent as if he had reserved the liferent with the same powers. In both cases the liferent has the same effect with a fee, except only that it does not transmit to heirs, where the heir of line is different from the person who is made *fiar* by the disposition.

Even taking the matter upon the footing of a simple faculty, when a person has a power to dispoise or burden lands, his contracted debts are looked upon as a sufficient exercise of that faculty in favour of the creditor, although he do not specifically grant an infestment for that debt ; and there is a very good reason for this, not only in equity, but according to the subtlest reasoning in *apicibus juris* ; because, whoever grants a personal bond, puts it in the power of the creditor to make that debt

ROME  
v.  
GRAHAM'S  
CREDITORS.  
1719.

ROME  
v.  
GRAHAM'S  
CREDITORS.  
1719.

real upon the land by diligence, as effectually as if he granted a disposition for security of that debt. Accordingly, nobody doubts that an adjudger has just as strong a right to lands, from the consent of the debtor, as he who obtains a voluntary disposition; and therefore our practice in this matter is most rational, that he who hath a faculty to burden lands, does effectually exercise that faculty according to the strictest rules, when he contracts a debt; which debt, by the forms and disposition of law, can be made a burden upon the lands, without any further deed or consent of his.

Allowing the granting a personal bond to be no exercise of the faculty in favour of the creditor, and allowing that faculty to have died with the father; still the adjudication, in equity, must be sustained against the son, though led after the father's death. The law has always been favourable to creditors in competition with heirs and children, especially such of them as are purely gratuitous successors. The father had a power to make his debts real upon his son's estate. The son, when he got the disposition, laid his account with being burdened accordingly; and if the father neglected to do what was in his power for the satisfaction of his lawful creditors, his son the donatar ought not to reap benefit thereby. It is enough in material equity, that the father had a faculty to burden; and when the law supplies his neglect, and authorizes adjudications to be led after his death, the son is in no worse case than if the father had exercised his faculty in favour of his creditors; which was a piece of justice he ought not to have refused them.

A faculty to dispoise or burden is truly a burden established upon the fee, and, as such, good against singular successors. Whenever the faculty is exercised by contracting even personal debt, it is in consequence of the faculty that the creditor has it in his power at any time, and against any proprietor, to make the same real upon the estate. Nor has the purchaser any cause to complain, since he purchases with the burden of a faculty engrossed in the conveyance in his favour. This gives him a full notification of his danger.

ARGUMENT FOR  
GRAHAM'S  
CREDITORS.

PLEADED FOR GRAHAM'S CREDITORS.—Mr. Rome's right flows *a non habente*. George Rome, the granter of the bond upon

which the adjudication was led, was only liferenter of the lands of Clowden ; and though he had an express power by the disposition, to sell, dispoise, burden, &c., the lands without reserve, yet not having specifically exercised that power, by granting any infestment upon the land, his personal bond could not affect it, unless Ballantine the creditor had adjudged the faculty from him during his own life, which he did not, but after his death, when the faculty was expired ; after which, the debt could not become real upon the lands by any adjudication. The fee flowed not from the father reserving to himself a liferent, but from a third party. In a disposition with a reserved liferent, and faculty to burden, &c., it may be thought that the fee is truly reserved, in so far as the faculty reaches ; but, where the fee is disposed to one, and a faculty to burden to another, there the faculty is merely personal, and not the consequence of a fee.

ROME  
v.  
GRAHAM'S  
CREDITORS.  
1719.

If it should be allowed that the father was fiar, and the son only conjunct with him, that will have no weight in the argument. The difficulty still recurs, how shall one's personal debts be made real upon lands, once indeed in the debtor's person, but now alienated, and no longer in his person, or that of his heir ? With George Rome the father's life, his interest in the lands of Clowden *funditus* ceased, so that they did not even remain in his *hæreditas jacens*. His son Thomas Rome became thereby absolute proprietor. But upon what medium could he be made liable more than any other singular successor ? Not certainly as heir, for he did not represent his father ; not as *successor titulo lucrativo*, nor upon the Act of Parliament 1621 ; for his succession was anterior to the contraction of the debt. In a word, taking the matter upon this footing, the father was like one of more proprietors *pro indiviso* in any subject. Such a proprietor, during the continuance of his property, can burden the common subject with his debt ; but whenever that ceases, by his death or otherwise, there is no longer access for his creditors who have not already established to themselves an interest in the subject, independent of their debtor. When a party having a faculty to burden, contracts personal debt, all that can possibly be implied is an assignation of that faculty, in so far as it may be a necessary medium to establish the debt

NUM  
v.  
GRANAN'S  
CREDITORS,  
1719.

upon the subject ; or in other words a mandate from the debtor to lead an adjudication. Nor need even this be granted. In a personal bond there is nothing implied or expressed but a simple obligation to pay, and when an adjudication is led thereon, it is not from any implied consent, but by the justice of the law, which supplying the want of will in the debtor, disposes of his goods for payment of his debts. In any view, contracting personal debts can never be interpreted an exercise of a faculty to burden. Were it so, the consequence would be, that the simple personal debt must be an effectual burden upon the subject, which can never be maintained ; and yet, there is no evading the consequence, if it be evident that the exerting a faculty to burden must produce an actual burden. If, then, the simple contracting of personal debt can infer nothing more but a mandate or assignation of the faculty, that mandate or assignation must fall whenever the faculty is extinct, by the death of the person in whom it subsisted ; and the case then becomes the same as if it never had been granted. There are no sorts of adjudications known in our law but against debtors, or their *hereditates jacentes*. To neither of these can the present adjudication be reduced. Whatever favour onerous creditors may have in the law, they can never be indulged in demands directly in the face of principles, and it is against all principles, that one's estate, which is his own without any burden, should be torn from him for the personal debt of another.

Allowing the contracting of personal debt to be such an exercise of the father's faculty, that the estate could have been affected as long as it was in the son's person, now that the estate is conveyed to onerous purchasers, without the burden of the bond, there is no longer place for affecting the estate in their persons.

It is admitted that a faculty to burden is good against singular successors, so as to be effectual to burden the estate in whatever hands it may come, if the faculty be exercised in a proper way. It does not however follow that personal bonds, which in no proper sense are exertions of the faculty, will thus affect the estate ; for, however it be pleaded, from considerations of equity, that they may be made effectual upon the estate as

long as remaining with the son, to whom the estate was purchased by the father's money, personal considerations of that or any other nature can have no place against successors for onerous causes, who are in quite different circumstances. When the father died, the faculty to burden died with him ; the fee became thereby absolute in the person of the son, and was conveyed in the same absolute manner to the purchaser. If it should be granted that the law, upon the account of some personal considerations of favour and equity, would indulge the father's creditor in a power of affecting it for his debt, and so make an adjudication once led good against singular successors, this must be done while the estate remained with the son. Since the creditor neglected that opportunity, *sibi imputet*. The purchaser who acquired an absolute right is safe, for against him these personal considerations cannot militate.

ROME  
v.  
GRAHAM'S  
CREDITORS.  
1719.

The Lords Found " The bond granted by George Rome to John Ballantine, in the year 1635, a good ground, whereupon the creditors might affect the said Thomas Rome, son to George the obligant, and the heirs of the said Thomas : But found that the bond cannot affect the singular successors of the said Thomas in the lands of Clowden."

JUDGMENT.  
Feb. 19, 1719.

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## II.—OGILVIE v. OGILVIE.

In 1724 Robert Ogilvie of Coul settled his estate in favour of his eldest son Dr. John Ogilvie, under this burden and provision, that he should have a power to burden the lands disposed with the payment of 5000 merks to any person he should think fit at any time in his life. Infestment followed upon the disposition in favour of the son, the reserved power to burden being engrossed in the sasine, and appearing on the record.

June 21, 1787.  
NARRATIVE.

In 1725 the father, upon the recital of the faculty to burden reserved in the disposition to his son, granted bonds of provision in favour of his daughter and widow to the extent of the 5000 merks.

OGILVIE  
v.  
OGILVIE.  
1787.

In 1726 the son provided his wife in an annuity of 800 merks, upon which she was infeft. He afterwards conveyed the lands to John Gardener, with his wife's consent ; and Gardener afterwards conveyed them to Thomas Ogilvie under the said burden, who having raised a multiplepinding, a competition ensued between the children of Mr. Robert Ogilvie and the widow of Dr. John Ogilvie his son.

ARGUMENT FOR  
DISPONER'S  
CHILDREN.

PLEADED FOR THE CHILDREN OF THE DISPONER.—At the time when Robert Ogilvie granted the disposition to his son such clauses of reservation as that contained in the disposition truly imported a real burden. Lord Stair observes,—“If an infeftment be granted with the burden of a sum, it makes that sum a real burden, and therefore a purchaser proceeds on his own hazard if he buy without sight of his author's infeftment ; for if one but get right as a creditor, that party having right to the sum burdening will be preferred as an anterior real creditor, and not personal only.” From this passage it is plain the learned Lord Stair thought that an infeftment granted with the burden of a sum, even though it did not mention the name of any particular creditor, made the same a real burden, and that the party who had right thereto would be preferred, seeing that he might adjudge upon it.

The law makes no distinction whether a particular creditor is mentioned, or if the faculty is in favour of persons under the collective denomination of children, or if the creditors are altogether uncertain ; because the disponer, in whose favours the faculty is conceived, being truly creditor, it may be affected for his debts, or he may dispoise to the extent thereof ; and when the creditors do appear, they come in place of the party who reserved the faculty. Considering, therefore, the question in this view, it removes all the difficulties or inconveniences that may be alleged to follow the uncertainty attending the creditors who have right to such faculty.

Neither is it easy to see how the widow's annuity can any way compete with the children, as her liferent is constituted by the son, whose title was subjected to this burden. Besides, the rendering such faculties ineffectual may be productive of many inconveniences. Thus it may often happen that, for the

good of a family, a father cannot decline putting his son in the fee of his estate ; at the same time he may have other children and creditors, whose provisions and debts he is willing to have secured, preferably to the son's fee. It may be inconvenient for him to determine the extent of these provisions, or to divide them among his children, by immediately granting heritable bonds, whereupon they may be infest. Would it not be hard if there was no way in our law to answer such reasonable intentions, by which no other person can be prejudged ? And yet it is believed it will be difficult to point out any other method than the one that has been followed here.

OGILVIE  
v.  
OGILVIE.  
1787.

PLEADED FOR THE WIDOW OF THE DISPONEE.—A reserved ARGUMENT FOR  
WIDOW OF  
DISPONEE. faculty is no more than reserving the fee in the disponent, in so far as extends to the power of charging the estate with the sum mentioned in the faculty ; of course, it can never be stronger than the fee itself. Now, no far can, by granting a personal bond, make the same a real burden without a clause of infestment, or diligence, by adjudication.

A debt cannot be a burden on a fee before it exists. Neither can the power to make it a burden make it real, where nothing is properly done to charge it upon the land. It is inconsistent with the nature of land-rights that any sums in general should be a real burden upon lands where either the extent of the sums or the creditor cannot be known by anything that appears in the right pretended to be burdened.

The distinction between a debt contracted with a certain creditor and a debt that has no creditor, is so plainly founded on common sense that it needs no authorities to establish it. Where the creditor is certain the infestment points out the burden, one knows what it is, and where it is ; but where there is no creditor, or no sum actually contracted, but only a power to do it, there is truly no burden affecting the subject at the time. It is a burden that may be, or may not be ; such as no purchaser can know, or have any security against. It is true it has been often found that such indefinite burdens are real ; but in a late case, viz., in the competition among the creditors of MacLellan of Barclay, the Court, upon considering the inconveniences that followed therefrom, found, that such clauses did



OGILVIE  
v.  
OGILVIE.  

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1787.

not import a real burden upon land. But abstracting from particular cases, it seems inconsistent with principle, that any debt, contracted in consequence of a faculty, should be real, unless he that has the faculty make it so, by charging it upon the estate ; and until that is done, it must remain only a personal burden affecting the disponent. Neither is it so obvious how a debt, not contracted perhaps for many years after an infestment, should be a real burden thereon, so as to prejudice immediate rights ; or that a power to make a debt real does, *ipso facto*, produce that effect by the contraction, more than that every fiar's debts are real, because he has the power to make them so.

It is said that creditors may adjudge such faculties ; but when they have done it, still they get no more than a power to secure their own debts, by making them real ; but this does not prove that personal debts, contracted in virtue of such a faculty, are real, as from the date of the infestment burdened, so as to exclude other creditors. Neither is there anything in the observation that the bonds, granted in virtue of the faculty, should be preferable to the liferent infestment, as it was constituted by the son, whose right was subjected to this burden ; because the widow founds her plea upon this, that her infestment is real, flowing from the fiar before the debts contracted in consequence of the faculty were real ; nay, that they are not so to this day. And it can have no influence, that the son's title was burdened ; *i.e.*, that he was personally burdened, unless the debts to which he was subjected had been real previous to her infestment.

As to the inconveniences which it is said would follow the rendering such faculties ineffectual, they are quite imaginary ; because, if a father has a mind to secure provisions to his children, or a fund for creditors, yea, even for after transactions, there are many ways to do it other than the one that has been here followed. To point out only one, why may not the father burden the estate with a special sum, payable to himself, or to any person he thinks fit ; and then, of course, he has the power of dividing and applying it to what uses he pleases ? This would be consistent with the principles of law, and remove every difficulty.

The Lords Found "That the bonds granted in pursuance of the faculty are only personal, so as to affect the heir, but are not real burdens affecting the lands."

OGILVIE  
v.  
OGILVIE.  
1787.

The children of the disponent having reclaimed, the Court "Adhered."

JUDGMENT.  
June 26, 1785.  
June 21, 1787.

LORD ELCHIES, in his Decisions, observes,—“The reclaiming bill against the interlocutor, 26th June 1735, was delayed from time to time, partly till the then question between these parties upon the relict's consent to the disposition to Gardener were likewise reported, and partly because of the importance of the point of law, viz., the effect of a reserved faculty to burden where either the creditor or the sum was indefinite, that is, where either it was not with the burden of a particular debt already existing, or then created. KILKERRAN's difficulty was, that the debts were not real; yet if the faculty was real, which he thought it was, the bonds might be made real by diligence, and would be drawn back to the date of the faculty, and he thought this was a reservation of a part of the fee to the extent of this sum. ARNISTON seemed to think the faculty real, and that this was a reserved estate effectual against singular successors; but then he thought that if he did not exercise it during his life, by granting infestments, the bonds granted by him could only be preferred to singular successors of the son according to the dates of their diligence, and therefore was for adhering. I agreed that it was a reserved estate, but not a reserved fee, or part of the fee of the lands, since the whole fee was in the son, who was the only vassal, and that reserved estate was no stronger than the like estate created, (if the father was not before proprietor,) as in the case of the Sinclairs and of the Romes, quoted in the Papers, (and in this ARNISTON agreed with me,) for both of them might grant infestments, but these infestments would be preferred only according to their dates with the creditors or singular successors of the son the *fiar*: That if the faculty was real, any exercise of it after the father's death was *inhabile*, at least could only be preferred according to their dates, otherwise they behoved to be preferred to all singular successors, *quandocunque* the creditors in them should adjudge. At last, without a division, the Lords adhered. But as to the other question now reported by Lord Balmerino,

Elchies' Decisions, vol. ii.  
p. 180.

OGILVIE  
v.  
OGILVIE.  
1787.

the Lords unanimously found that the relict of Dr. Ogilvie, by consenting to Gardener's disposition, containing expressly the burden of that faculty reserved to the father, was excluded from competing with the children of Robert Ogilvie the father ; for if such a faculty had been of new created to the father by that disposition, it would have been a *jus quæsitum tertio*, and binding upon the relict who consented, though no faculty had been reserved in the father's disposition to their debtor."

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1. On the Session Papers in the case of OGILVIE v. OGILVIE, LORD KILKERRAN has written,— "In my opinion the question turns upon this, Whether the power reserved to the father was a real or only a personal faculty ? If it was real, then no deed of his son in favour of a singular successor, however onerous, could defeat it ; and that I take to be the case here. For where one disposes his estate with such a reserved power, he so far reserves the fee. The fee so far remains with him, which therefore no deed of the disponee can defeat. The case is different where a father acquires an estate, and takes the right in the name of his son, reserving a power to himself to burden or affect it with such a sum. For that is but a personal faculty, the fee never having been in the father ; and therefore an onerous singular successor of the son, in whose favour the conveyance is taken, being infeft before the father exerce his faculty, will be preferable to any in whose favour the faculty was thereafter

exerced. And so the Lords found in the case of the Creditors of Provost Graham. But it is otherwise where one who is in the fee conveys and reserves, as it is here ; and if so, it is out of the case to ask whether the bonds granted by the father are real burdens, which they are not. But if the father's own right be real, these bonds may be made real by diligence, *quovis tempore*, to affect the subject preferably to the singular successor of the son. And taking the thing in this light, the decision in the case of MacLellan of Barclay has nothing to do with the case, no more being then found but that a general burden of the disponer's debts, quite indefinite and general as to creditor and extent, was not real, but not that a father disposing to his own son cannot reserve the fee to a certain extent. It may be a question among the creditors of the father which of them shall be preferred upon this £5000 ; but in a question with the son there can be no question but that the father's creditors are preferable

to him or his singular successor, however onerous. *Nota*, When I call the right which remained with the father real, I do not mean that it is a burden upon the son's fee, but that it is a burden upon the subject, and of the nature of a collateral right with that of the son's. Whereas a faculty is only a power to affect the son's fee, which may be defeated if the son do first affect it himself to the value; whereas the proprietor of one collateral right can by no deed of his defeat the collateral right of another.

2. "When the Bill and Answers were moved, I gave my opinion as above, which occasioned no small demur, and little answer was made, only Elchies quoted a decision in the cases of Calder of Lidoger and Sinclair of Barroch, which occasioned a delay until these decisions should be looked out, and the lawyers were requested to be at the bar. Upon this delay Elchies took occasion to speak to me before the case should come on. He observed that the question indeed only lay where I had put it, and that the same had never before been taken up in that light either by the bar or the bench. But he said that he had a great difficulty about it, that he could see no difference between the reserved faculty, where the father acquired the right in name of the son, and where he reserved in a disposition made by himself to his son. *Nota*, Mark that what I have before said by way of *Nota*, for explaining this difference, had not been then suggested by me on the bench, but was added since the said conversation

VOL. III.

with Elchies. That he thought the matter lay here, that in both rights the right in the father was only a faculty, that in both he thought it was real, but that the distinction lay here,—Whether it was exercised in the father's life by a public act, as by granting infeftment, or even by a contracting of debt, whereupon adjudication followed in the father's life? In both these cases he thought that the right flowing from the father, or adjudication upon his debt, would be preferable even to a prior singular successor of the son, but that if the father only granted a personal bond never made real by adjudication during his life, it could not after his death become preferable, by adjudging upon it, to the son's singular successor. He also said the security by the records would be destroyed, for the reserved power may happen to be for contracting a sum beyond the value of the estate.

3. "But I am not yet satisfied. I think the difference plain between a faculty reserved where the reserver was never in the fee, and a power reserved where the reserver was fiar in the lands; and that upon the very ground before mentioned, by way of *Nota*. And one effect of the difference I take to be this, that even in the father's life, I think the son's singular successor obtaining the first right where the father's reserved power was only a faculty, as in the case of Provost Graham's creditors, would be preferable to any right flowing from the father in exercise of that faculty, because the father's

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power in that case is no other than a power to burden the son's fee, which the son may disappoint by alienating the fee before the father exercised his power. Not so, if the father's right was not merely a power to burden the son's fee, but in reality a right collateral with the son's own right. When I speak of the father's power as only a faculty in the one case, I think that faculty is so far exercised by contracting any simple debt. Then the creditor has it in his power to adjudge upon it even after the father's death, and will be preferred to any deed of the son posterior to that adjudication. But then the question comes, and here lies the difficulty stated by Elchies,—Whether the singular successor of the son can in either case be hurt by an adjudication after the father's death, and posterior to his right, which Elchies says would destroy the security of the records? The record is not, nor cannot in all cases be a security. Would not a creditor of the husband, adjudging a subject conveyed by the husband to his wife, though after the husband's death, be preferred to a singular successor of the wife? What security was there till the Act of Parliament 1669 against resignations *ad remanentiam*? On the same ground, I do not see what security the record can give against debts contracted by one having—not as a mere faculty, but as a right—a power to burden, or a power to alter, but that *quovis tempore* an adjudication upon such debts will be effectual against all singular

successors of the son."—*MS. Notes, Kilkerran's Session Papers.*

4. The distinction taken by LORD KILKERRAN in this Note between the case of a party infest, and reserving a power to burden in the conveyance executed by himself, and the case of a party not infest, but acquiring a subject in the name of another, under a reservation to himself to burden, is plausible, and appears at first to be well founded. This view places the reserved right, in the first case, in the light of a part of the original fee carved out and retained, and makes the *reality* of the reserved power depend on the original infestment of the fiar. The view, however, taken by LORD ELCHIES is the sounder one, which places both cases in the same condition, and makes the *reality* of the reserved power to depend not on the infestment of the reserver, but on that of the disponee. LORD KILKERRAN himself appears to have adopted this view at last, as shewn in the Note of his opinion in the subsequent case of CUNNINGHAM v. CUNNINGHAM'S CREDITORS. In the case of CUTHBERTSON v. BARR, already given, it has been seen that LORD PRESIDENT CAMPBELL was at one time disposed to hold the view taken by LORD KILKERRAN in the case of OGILVY v. OGILVY'S CHILDREN. It may now, however, be held to be settled, that a reserved real burden, and a reserved power to burden, depends on the infestment, not of the party reserving, whether he be originally fiar or not, but on the infestment of the disponee.

III.—CUNNINGHAM *v.* CUNNINGHAM'S CREDITORS.

In 1708 William Cunningham of Boghan conveyed his lands to his son Henry, reserving to himself the power to burden the lands with the sum of 10,000 merks, payable at his decease. The clause of reservation was repeated in the procuratory and precept which followed upon the disposition. In a contract of marriage with a second wife, he exercised the faculty of burdening the estate with 10,000 merks in favour of the children of the second marriage, and he afterwards assigned to Mrs. Helen Cunningham, his daughter of the second marriage, the said 10,000 merks, and the conveyance in his daughter's favour was registered in the Sheriff-Court books of Stirling. Henry the son contracted several personal debts after his father's decease ; and on a sale of the estate, a competition arose between his creditors and Mrs. Helen Cunningham his sister, by the second marriage of his father, as to whether the reserved faculty as to the 10,000 merks, exercised by the father in favour of his daughter, was a real burden upon the estate, preferable to the debts of his son the disponee.

Nov. 14. 1739.

NARRATIVE.

PLEADED FOR THE DISPONER'S DAUGHTER.—William Cunningham the father was a real creditor in the faculty, to the extent of 10,000 merks, whenever he pleased to exercise it. This conditional credit, competent to him against his son upon the subject disposed, did as much affect the fee, and could as little be defeated or voided by the deeds of the son, as if it had been a pure and unconditional debt. It has indeed been often disputed how far general burdens could be effectual against singular successors in the subject, though even conceived in a real manner as a burden thereon, and always given in favour of the general burdens, till of late the consideration that the lieges' security from the records ought not to be impaired, has made the Court reverse these judgments. But these later precedents cannot affect the present question ; for here the precise sum is ascertained, as likewise the creditor in the faculty, who was William Cunningham himself.

ARGUMENT FOR  
DISPONER'S  
DAUGHTER.

It is true this faculty might have been exercised in favour

CUNNINGHAM  
v.  
CUNNINGHAM'S  
CREDITORS.  
1789.

of persons unknown, and whose right could not be discovered from the records, which are intended to certiorate the lieges ; and consequently the registration of Mrs. Cunningham's right in the Sheriff-Court books cannot be much relied on. But the argument founded upon this fact is of little avail ; for, had this been an actual reserved sum of 10,000 merks to Mr. Cunningham, it might have been assigned to any person whatever by a mere personal deed, and been effectual to the assignee ; and consequently, the assignee's right could not appear upon the Record of Sasines and Reversions, more than that of the person in whose favour this faculty is exercised. In short, the nature of this reservation is such that it would seem no more was requisite for converting the faculty into a real burden, but such a deed as appears in Mr. Cunningham's second contract of marriage, declaring that he burdened the lands with that sum. It would have been altogether inept if he had granted an infestment of annualrent, or the like security upon the land, after he was denuded of the estate, and his son publicly infest. The meaning, therefore, could not have been that he was to dispoise the lands in security, or an annualrent out of them, corresponding to the 10,000 merks, established by a sasine lawfully executed. He was already denuded, without power of revocation, of the fee of the estate, by an actual deed delivered to the son, which therefore he could not affect in that manner.

ARGUMENT FOR  
DISPONEE'S  
CREDITORS.

PLEADED FOR THE DISPONEE'S CREDITORS.—The reserved faculty in the son's contract was indeed a real burden upon, or power reserved to the father over the estate disposed, whereby he might have granted warrants for infesting any person he pleased, in the same way he could have done if he had remained proprietor in full fee of the whole estate, or in the same way that he could have done if he had been infest over the whole upon an heritable bond for the sum in the faculty. But in all these cases the father must have proceeded in the known regular manner of granting infestments by procuratory, &c. ; for no declaration in writing, or assignation in favour of a third person, without these, can produce a real and preferable right upon lands to such third party, whether the granter of such declaration or assignation be infest in the estate as proprietor thereof,

or as creditor by heritable bond, or as having a faculty to burden it.

CUNNINGHAM  
v.  
CUNNINGHAM'S  
CREDITORS.  
1739.

It is true that Mrs. Cunningham, as a personal creditor to her father, or as his assignee by personal deed, had it in her power, by adjudication proceeding on the said personal deeds, to have attained infestment upon the estate, valid to the extent of the faculty, and preferable to other rights affecting the same, according to its order of time ; exactly as any man's personal creditors or disponees by personal deeds, wanting procuratory and precept, may attain, by a proper course of diligence, valid infestments in the estate, or real rights in which their debtors or authors stand infest. It is quite inconsistent, however, with the nature of real rights to admit that any real or preferable right in lands can be established or conveyed into the person of a third party, either in virtue of a faculty, or of a right of property, or real credit, without actual infestment recorded in the proper register in favour of such person.

The reserved faculty did not import a reservation of any part of the estate whereof the fee was conveyed to the son, which could with any propriety be called a separate estate in the father different from that which was conveyed to the son, so as to remain unaffected by the son's creditors. It imported only a power in the father to affect the estate with real rights to the extent of 10,000 merks in virtue of the faculty, as well as the son might affect it in virtue of his fee ; so that it might have been affected by either of them, if the same had been done in the proper form of constituting real rights. That however being neglected, it could not be affected by the deeds of either, otherwise than by a course of legal diligence, in which the rule of preference would be *prior tempore potior jure*. And as to the notion that the faculty was assignable by personal deeds of the father, so as to establish the right in the assignee, the creditors conceive that to be altogether inconsistent with the forms made essential by the law for the transmission of real rights.

The Lords Found " That Miss Cunningham, in whose favour the faculty was exercised, is preferable to the son's personal creditors, who have done no diligence to affect the estate."

JUDGMENT.  
Nov. 14, 1739.

The creditors of the son having reclaimed, the Court " Adhered."

Dec. 11, 1739.



CUNNINGHAM  
v.  
CUNNINGHAM'S  
CREDITORS.  
1789.  
Elchies' Deci-  
sions, vol. ii. p.  
131.

LORD ELCHIES, in the note to his Decisions, observes,—“ The Lords Found that Miss Cunningham upon her personal bond in exercise of the faculty had no real right upon the subject, and was not preferable to the real creditors of the son ; but they found her preferable to his personal creditors who had done no diligence (no more than she had) to affect the estate ; which to me appeared a very new and odd decision, that in competition of creditors merely personal for the price of the lands, none of whom had any real right in the lands, or used diligence for affecting the same, should yet be preferable one of them to the rest, since the law knows no privileged debts upon lands other than what are real. ARNISTON put his opinion upon this, that the reserved faculty was an implied prohibition to the son to contract debt in prejudice of the faculty, and the PRESIDENT seemed to carry the observation farther, to be a sort of inhibition to the lieges to lend to the son in prejudice of the faculty ; but ARNISTON would not carry it so far. But I own the whole went far beyond the reach of my poor understanding.—11th December, Adhered seven to six.”

1. LORD KILKERRAN in his Decisions thus reports the case of CUNNINGHAM v. CUNNINGHAM'S Creditors:—“ A father having disposed his estate to his son, reserving a faculty to himself to burden and affect the lands with £10,000 Scots money ; and having, in his second contract of marriage, upon the narrative of the said reserved power, provided the said sum to the issue of the marriage, and declared that he burdened and affected the lands with the payment thereof to the bairns of the marriage, in terms of the reservation in his son's contract, and assigned them in and to the

said faculty ; and, by another disposition, proceeding upon the narrative of his said contract of marriage, disposed to the child then procreate of the marriage, the said sum, and assigned her to the faculty reserved in the disposition to his son ;—in a competition between the said child of the second marriage, and the personal creditors of the son, upon the price of the lands due by the purchaser thereof, at a judicial sale carried on by the said child of the second marriage, as apparent heir to her brother the disponent to the estate, the Lords ‘ Found the said child of the second marriage, in whose

favour the faculty was exercised, preferable to the son's personal creditors, who had done no diligence to affect the estate.'

2. "In this the Lords were not unanimous. It was observed, That a century ago, all such faculties were quite ineffectual, unless exercised specifically by burdening the lands by infestment; inso-much, that even no personal action lay against the disponee, to the personal creditor of the granter. In process of time, the Lords did, it is true, *ex æquitate*, so far remit this rigorous construction of such faculties, as to give personal action; but to give the personal creditor of the disponent a preference, appeared to be without foundation, as it was without precedent. An assignation of the faculty by a personal deed is no exercise of the faculty. It may have been intended as such by the granter; but an intention is nothing when not habilely executed, and such assignee is still no more than a personal creditor. Now, had the Lords found that the granter's bare contracting debt was an exercise of the faculty, and there-upon found even the personal creditors of the granter preferable to infestments from the disponee, the ground of the decision might have been understood, though not approved of; but this middle way of finding the faculty exercised to the effect of giving preference over the disponee's personal creditors, and not also over his real creditors, was what several of the Lords could not approve.

3. "It is an agreed point, that a

faculty to burden, or a faculty to alter, is a real right; but it is quite a different question, What rights granted in consequence of such faculty are real? Now, as such faculty is a real right, it follows, that no infestments granted by the disponee can defeat the granter's power to burden or alter. Yet, this is to be understood with a limitation; for, though an infestment at any time in the granter's life will be preferable to an infestment by the disponee, though prior, and an infestment from the granter, though not taken upon his precept till after his death, will be preferable to an infestment from the disponee, if posterior thereto, yet, if at the granter's death, there is no infestment from him on record, the creditor or singular successor of the disponee, obtaining infestment on the faith of the record, will be preferable to any infestment that may afterwards be taken upon the granter's precept, which lay latent at his death; and were it otherwise, the security by the records would be wholly frustrated.

4. "And upon this ground it was, that in the case of Ogilvy of Coul, the Lords preferred an infestment by a son the disponee, to the creditor of the father adjudging after the father's death, though the son's disposition was with the burden of a faculty to the father to contract debt to the extent of the said creditor's debt. In like manner, anno 1737, a bill of suspension being presented by the purchaser of the estate of Scotsraig, against the creditors, on this ground, that he was not *in tuto* to

pay the price, for that by a reserved faculty in his author's right to burden the lands with a certain sum, he might be in hazard of eviction; the Lords, in respect his author was then dead, and no exercise of the faculty on record, 'remitted to the Ordinary to refuse the bill.'—*Kilkerran's Decisions*, p. 186.

5. On the Session Papers LORD KILKERRAN has written,—“Having been Ordinary when this case was reported, I knew not what passed upon that occasion; but when the Bill and Answers came to be advised, it was argued by Elchies, who was against the interlocutor, that of old, about a century ago, such faculties were quite ineffectual unless exercised specifically, by burdening the lands by infestment, insomuch that no personal action lay even against the disponee for payment of any contraction of the disponent who might have exercised the faculty, but that in process of time the Lords did *ex equitate* so far remit the rigorous construction of such faculties as to give personal action, but that now to carry it thus much farther, as to give the personal creditors of the disponent a preference, appeared to be without foundation as it was without precedent,—that if the Lords should find that contracting debt by the disponent was an exercise of the faculty, and thereupon prefer the creditors of the disponent even to infestments granted by the disponee, the ground of the decision would be understood though not assented to, but the middle way

of preferring Mrs. Cunningham, though only a personal creditor, to the disponee's personal creditors, and preferring his real creditors to her, appeared to be void of all foundation to stand upon. ARNISTON, who was for the interlocutor, observed that Mrs. Cunningham was not only a personal creditor, but that the faculty was expressly exercised in her favour; that it was true that exercise was only by a personal deed conveying the faculty, and therefore not effectual against real creditors of the disponee, but he saw no reason why it should not be effectual against personal creditors, since, by the now long practice, such exercise of the faculty by actually engrossing the burden in the infestment, was no longer necessary to give it effect. LORD PRESIDENT FORBES argued to the same purpose, but did not consider that alteration of the old practice to be merely *ex equitate*, but that in justice the old practice should never have been the practice—that for his part, but for the decisions to the contrary of late, he should have been of opinion that an exercise of the faculty by such personal deed, was effectual against the real creditors of the disponee, but as that was now settled there was no help for it. So far the practice had gone to secure the real creditors of the disponee, and no farther.

6. “As to the matter of reserved faculties, that the faculty itself is real is undoubted, and therefore should the disponee give ever so many infestments, a pos-

terior infestment given in exercise of the faculty would be preferable, but then it is quite another question, what deeds or debts of the person having the faculty are real, and to be sure his personal deeds, however intended, in exercise of the faculty will convey no real right. And so it was here admitted, that by the assignation to the faculty no real right was conveyed; for, by the bye, the President's notice was very loose, and that being the case, and that such assignation was no habile conveyance, it is far from clear upon what foundation it would give any preference even to the personal creditors of the disponee, more than such assignee would have had by being a personal creditor. That the assignation was intended by the granter to give such preference may be true, but an intention is nothing when not habilely executed.

7. "It may not be here amiss to note two other late cases upon the import of a reserved faculty to burden. It has been said that a faculty reserved to burden is a real right, and therefore an infestment given in exercise of the faculty will be preferable to a prior infestment given by the disponee, whose own right was granted under that burden, just as when a disposition is granted with a power to alter, which often is the case of dispositions of a father to his son, no infestment flowing from the son can defeat the father's power to alter. Yet this is to be understood with a limitation, for though an infestment at any time

during the granter's life will be preferable to an infestment by a disponee though prior, and even an infestment from the granter, though not taken upon his precept till after his death, will be preferable to the infestment from the disponee if posterior thereto, yet if, at the granter's death, there is no infestment from him upon record, the creditor or the singular successor of the disponee obtaining infestment upon the faith of the record when the faculty was at an end, namely, by the granter's death, and when there is no evidence of it having been exercised, will be preferable to any infestment that may thereafter be taken, though upon the granter's precept which lay then latent. Were it otherwise, the security by the records would be entirely frustrate, since hardly, by the lapse of any time, could there be a purchase from the disponee with safety. And upon this ground it was that in the case of Ogilvy of Coul, the Lords preferred an infestment by the son and disponee to the creditor adjudging after the father's death, though the son's disposition was under a faculty to the father to contract debt to the extent of the said creditor's debt. In like manner about two sessions ago, in a suspension of the purchaser of Scotsraig against the creditors, on the ground that he was not *in tuto* to pay the price for that by such reserved faculty with which his author's right was burdened, he might be in hazard of eviction. The Lords repelled the reason of suspension, in respect the person

who had the faculty was now dead, and there was no evidence on record of the faculty being exercised. N.B.—These were the decisions which the President had in view when he said as above, having not been cordial in the last mentioned of them when pronounced—the former was before his accession to the Bench.”—*MS. Notes, Kilkerran's Session Papers.*

8. The case of CUNNINGHAM is also mentioned by Lord Monboddo in his Decisions. He observes,—“It being established by decisions that the reserved faculty of burdening an estate inserted in a disposition, would not create a real right upon the estate unless it were exercised *habili modo*, i.e., in a way proper to create a real burden upon the estate; the question here came to be, Whether a personal creditor of the disponent, in consequence of this reserved faculty, was not preferable to the personal creditors of the disponent? It was argued for the negative, That this was making a new sort of creditors, unknown in our law: that their Lordships had already found, and with the greatest reason, that a creditor of the faculty was no real creditor, unless he stood infeft in the estate; and to find now that he was preferable to the personal creditors of the disponent, was to make him neither a real nor a personal creditor, but something betwixt both. To this it was answered,—That the reason why such creditors were not brought in among the real creditors, was, that creditors or purchasers, contracting upon the faith

of the records, might not be deceived, since from them it could not appear whether the faculty was exercised or not. But, as in this question the faith of the records was out of the question, as the creditors of the disponent had rested upon his personal credit, and done no diligence against the estate, it was highly reasonable that Miss Cunningham, the creditor in virtue of the reserved faculty, should be preferred to them, especially as the reservation of this faculty was a quality of the right, a *modus* under which it was given: that preference among personal creditors was no new thing: among the Romans, *qui in funus crediderunt* were personal creditors, and yet preferable to all creditors whatsoever.

9. “Here it may not be improper to observe the progress of the law in the matter of reserved faculties. It was first doubted whether the faculty was at all exercised by the personal deeds of the disponent, even so as to make the disponent personally liable. But this was determined in the affirmative; and the Lords went so far as to find that the simple contracting of debt was virtually an exercise of that faculty, 23d June 1698, Alexander Carnegie of Kinfarns; nay, they found that the reserved faculty accresced to a creditor whose debt was contracted before the faculty, Elliot against Elliot, December 16, 1698. After that they went a step farther, and found, That the faculty, though exercised only by a personal deed, was a real burden upon the estate.

But this they have altered of late years, and found that such an exercise of the faculty gave only a personal right; but by this decision they have made it a personal right preferable to other personal rights. With respect to the foregoing decision about the reserved faculty, there is one case which seems yet to be doubtful, viz.:—The disponent exerts this faculty *habili modo*, by granting an infeftment upon the estate; but this is

not done till after the disponent has burdened the estate with real debts, or totally alienated it. *Quære*, If, in that case, the creditor of the disponent, by virtue of the faculty, would be preferable to the creditors of the disponent or the purchaser? Lord Elchies, in the debate, said, that in that case the infeftment in virtue of the faculty would be drawn back to the date of the faculty.”—*Brown’s Supplement*, vol. v. p. 682.

#### IV.—HENDERSON *v.* HENDERSON’S CREDITORS.

In 1738 James Henderson conveyed his estate to his eldest son Francis, reserving to himself a power to burden it at any time of his life with the sum of 8000 merks to any person he should think proper. On this disposition the son never was infeft.

July 8, 1760.

NARRATIVE.

In 1750 the father executed a testament, in which he bequeathed to his three younger sons the foresaid sum of 8000 merks, in virtue of the power reserved in the disposition to his eldest son. After the father’s death the creditors of the eldest son adjudged the estate in 1753, and one of them having obtained a charter under the Great Seal in 1756, was infeft upon it. The younger sons obtained a decree against their brother, 1754, and upon this decree they adjudged the lands in 1755; and in a ranking and sale of the estate they insisted upon a preference over their elder brother.

PLEADED FOR THE SONS OF THE DISPONER.—In common equity, the debts and deeds of a predecessor are entitled to be preferred to those of the successor. An heir naturally takes nothing by the death of a predecessor, but what remains over and above satisfying his debts and legacies; and the creditors of an heir

ARGUMENT FOR  
THE YOUNGER  
SONS.

HENDERSON  
v.  
HENDERSON'S  
CREDITORS.  
1760.

ought to be in no better case than himself. This is agreeable to the Roman law, whereby a *separatio bonorum* was allowed in case of the insolvency of an heir, both to the creditors and legatary of the predecessor.

The reserved faculty of James Henderson the father, after he was infeft upon the precept of sasine in Brisbane's disposition, became a right of property in him, in the same manner as if a particular part of the lands had been excepted from the disposition to his son. Whether therefore that right of property shall be considered as *in hæreditate jacente* of him, when the creditors of the son adjudged the estate upon a special charge to enter heir, or as already disposed of to his younger children, by the exercise of this reserved faculty; in either case, these younger children fall to be preferred, in virtue of their adjudications, to the creditors of the son. If it shall be held, that the 8000 merks, at the time the adjudications were led against the son, was an estate *in hæreditate jacente* of the father, in the same way that a reserved property would have been, then the creditors of the father, or any claiming in his right, are preferable by Act 24, Parliament 1661, to the creditors of the apparent heir; because, in terms of that Statute, they have done diligence within three years after the father's death. If, on the other hand, this reserved estate shall be considered as given away by the father in his own lifetime, it could not be carried by an adjudication led against the son, upon a special charge to enter heir to his father; and it therefore still remained with the younger children, notwithstanding such adjudication.

The adjudications led by the creditors could not carry the reserved right in the father, which was neither *in hæreditate jacente* of him, nor disposed to his eldest son. All that they could carry was the personal right to the lands, with the exception of the reserved right, for the son had only a personal right to the lands by the father's disposition; and accordingly the adjudications specially mention and adjudge that personal right. And, therefore, taking the matter in this light, there seems to be no doubt, that the younger children are preferable, for the 8000 merks, to any deriving right from the son to the disposition granted to him by his father, as the power to burden with that sum was expressly contained in the disposition.

The creditors derive right from Francis, as legal assignees to the father's disposition, and they saw that it was burdened with this faculty. If, indeed, Francis had made up titles to his father, by serving heir in special to him, as infeft and seised in the lands, creditors and purchasers might have been in safety to contract with him, upon the faith of this simple and unlimited right appearing in him upon record; but the present case is different; for they saw, that he had only a personal right by the disposition, clogged with a reserved faculty.

HENDERSON  
v.  
HENDERSON'S  
CREDITORS.  
1760.

PLEADED FOR THE CREDITORS OF THE DISPONEE.—The Act ARGUMENT FOR  
THE ELDER  
BROTHER'S  
CREDITORS.  
1661 applies only to the case where the estate is left *in hæreditate jacente* of the defunct, not disposed away by him during his life, and where it is necessary for the heir to make up titles by service. In such case, the law has given the creditors of the deceased three years, during which they may establish a preference to themselves by real diligence upon the estate. But if he disposed the estate away in his own life, either to his apparent heir, or to any other person, the case does not fall within the Statute; nor does it make any difference, whether, in disposing his estate in his lifetime, he reserved any powers or not. The extraordinary privilege given by the Statute, applies singly to the case where the property of the estate was left *in hæreditate jacente*.

Besides, supposing the estate had really remained with James Henderson, the younger children could have taken no benefit from the Act 1661; because they cannot qualify themselves to be his creditors; for he came under no obligation whatever to pay them any sum of money. The only ground of their claim is, that he left them a legacy of 8000 merks, with which he had a power to burden the estate. Upon this legacy the younger children brought a process against their brother, and obtained a personal decree against him for payment. By this decree they became creditors, not to their father, but to their brother; and they adjudged his estate along with his other creditors.

Neither is there any ground in common law upon which this preference can be established. One of the great advantages enjoyed in this country is the security arising from the records. If a proprietor should express his intention in the clearest man-



HENDERSON  
v.  
HENDERSON'S  
CREDITORS.  

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1760.

ner, to subject his lands to a burden ; yet, if it is not so conceived, that it can appear from the record, who are the parties entitled to claim under that burden, the law will not allow it to be effectual. Such is the case of dispositions and infeftments. It is inconsistent with feudal principles, and with the security of the records, that a real right or burden should be established in persons unknown. The same thing holds with regard to faculties reserved by disponers. Such faculty imports no more than a power in the disponent to burden, or perhaps to alienate, the lands ; but that power must be exercised in a manner consistent with feudal principles and the security of the records ; otherwise it can have no effect against third parties, who have properly established a right to the lands, whether by voluntary or legal titles. He may indeed grant infeftments in exercise of the faculty ; and these will be good against the disponent, or any person deriving right from him ; but if no infeftment appears, and after the disponent's death, when the faculty is at an end, the disponent sells, or contracts debt, or his creditors affect the lands, a personal deed of the disponent will not be entitled to compete with creditors or purchasers infeft by the proprietor.

No man can, by a reserved faculty to burden lands, have a greater power than if he had reserved a part of the fee ; and as, in that case, his personal deeds could not affect the lands, nor compete with real rights granted by the heir, after his own fee is at an end ; so it is equally inconsistent to suppose, that a personal bond or legacy, granted by one who has a reserved faculty, should affect the land. Such personal act or deed cannot be discovered from any record ; and therefore it would be putting lands *extra commercium*, to give it the effect pleaded for by the younger children. The general rule is, That the preference must be determined by the priority of infeftment ; and if no infeftment appears when the faculty is expired, the lands are subject to the deeds of the proprietor, without any restraint.

JUDGMENT.  
July 8, 1760.

The Lords Found, " That the younger sons were only preferable for the 8000 merks, according to their diligence."

*Where a party conveys Lands under a reserved power to burden with debt, debts contracted either before or after the date of the Disposition are held to be a valid exercise of the reserved power.*

I.—ELLIOT v. ELLIOT.

ADAM ELLIOT of Meikledale disposed his lands to his eldest son William, reserving to himself the power to burden the lands to the extent of one-third of their value. After the father's death, Simeon Elliot of Swineside pursued the son for payment of the sum of 2000 merks, being part of a tocher of 8000 merks provided by Adam Elliot in his daughter's contract of marriage, and to which Simeon Elliot had right by assignation. The provision by Adam Elliot to his daughter was anterior to the disposition to his son.

Dec. 16, 1693.

NARRATIVE.

PLEADED FOR THE PURSUER.—In a competition with heirs, the creditors of a father ought always to be preferred, in so far as it was in the power of the father to prefer them. A father, therefore, who has the power to burden his son's fee, is understood to do the same effectually, *eo ipso*, that he contracts debts, whereby the son becomes liable *in valorem* of the father's faculty, without any more special exercise thereof, with this caution only, that there appears no other sufficient estate to pay the debt; and so it was found, 23d June 1698, John Carnegie against Blair, *alias* Carnegie of Kinfauns. The same ground of law operates equally, whether the debt be prior or posterior to the faculty; because the father is as much bound by prior debts as posterior, and the presumption is as strong in favour of prior as posterior creditors, that the debtor wills and desires them to be effectually secured.

ARGUMENT FOR PURSUER.

PLEADED FOR THE DEFENDER.—The defender is not liable by virtue of the reserved faculty, because the words in the faculty run *in futuro*, that it shall be leesome in the father to burden. It was not intended, therefore, that any debt already contracted should lie as a burden upon the fee, but only that it should be

ARGUMENT FOR DEFENDER.

ELLIOT  
v.  
ELLIOT.  
1698.

lawful by posterior debts or deeds to burden the fee. The faculty, too, was to burden the lands with any debts or deeds ; but the simple contracting of debt can lay no real burden upon the land, and so cannot be reckoned any exercise of the faculty.

JUDGMENT.  
Dec. 16, 1698.

The Lords Found, "That the pursuer's debt being anterior to the faculty, did not put it in a worse condition than if it had been contracted thereafter ; and found, that the creditors of a father having a faculty to burden, have the benefit of that faculty, *eo ipso*, that they are lawful creditors, unless another estate can be condescended upon, which may effectually operate their payment ; and therefore found Meikledale liable for the debt libelled, as being far within the value of the sum wherewith the father had a faculty to burden his fee, and resolved to follow the same rule in all such cases that might occur."

Fountainhall's  
Decisions, vol.  
ii. p. 26.

LORD FOUNTAINHALL, in his Decisions, observes,—“ In the debate betwixt Elliot of Swineside and Elliot of Meikledale, it fell to be argued, how far a reserved faculty by a father, in his son's right of fee, allowing the father to burden the lands with such a sum, accresced to a creditor whose debt was contracted before that faculty. The Lords were generally clear, that *quoad* debts subsequent to that reserved power, the contracting thereof was a presumptive exercise of the faculty, though not expressly mentioned to be in right and by virtue thereof, as was found on the 23d June 1698, betwixt Blair of Kinfauns and his sister, though there was a contrary decision instanced betwixt James Scot and Mr. Andrew Ury in 1692, which required a specific application ; otherwise found the faculty personal and extinct, unless either applied or affected by diligence. But the Lords were so far from regarding this in Elliot's case, that they found it accresced even to an anterior creditor, though he could not lend his money on the faith of that faculty, which was not then in being ; but the Lords thought reasonable to subject these faculties to all their debts, whether prior or posterior.”

II.—BLAIR *v.* RUSCO'S CREDITORS.

Hugh Blair of Rusco conveyed certain lands to the sons of Jan. 17, 1724.  
 his second marriage, reserving to himself the liferent of the NARRATIVE.  
 lands, and also "full power to alter and innovate these presents,  
 and to contract debts thereupon at any time of his life, *ac etiam*  
*articulo mortis*, and to grant securities therefor as freely in all  
 respects as if the entire fee of the lands were in his own per-  
 son." On this conveyance infestment followed.

After the date of this conveyance several debts were con-  
 tracted by the father on personal bonds, and after his death  
 the creditor in the bonds adjudged the lands. In the process  
 of ranking and sale a competition took place between the credi-  
 tors of the father and his sons of the second marriage.

PLEADED FOR THE CREDITORS.—The contracting of debts by ARGUMENT FOR  
 the father, and his granting personal obligations therefor, was CREDITORS.  
 an exercise of the faculty reserved by him in the disposition to  
 his children of the second marriage. The creditors in those  
 bonds adjudging after the decease of the father ought therefore  
 to be preferred to the disponees.

The faculty reserved by the father might be exercised by  
 him by contracting debt, although no heritable security was  
 granted; and being once exercised, it cannot be said to have  
 died with the father. A subsequent adjudication, therefore,  
 proceeding on the personal debt, is not an adjudging of the  
 faculty, but is truly an adjudging of the lands upon the personal  
 debt contracted by the father in virtue of the faculty reserved  
 by him.

The faculty reserved is one to contract debts at any time  
*etiam in lecto*, and to give securities therefor, as the disponent  
 shall think fit. These words import that the father was not to  
 be restricted to the granting of heritable securities, for he was  
 fully empowered to grant what securities he should think fit.  
 A personal bond is a security, and is a plain instruction of a  
 debt, and therefore the granting thereof must be accounted a  
 full exercise of the faculty in the specific terms thereof.

BLAIR  
 v.  
 RUSCO'S  
 CREDITORS.  
 1724.  
 ARGUMENT FOR  
 DISPONEES.

PLEADED FOR THE DISPONEES.—The faculty reserved by the father was to contract debt upon the lands conveyed. No heritable securities, however, were granted by him. Neither were the personal debts contracted by him made real on the lands by adjudication in the lifetime of their father. The lands cannot therefore be adjudged for the personal debts after his death.

JUDGMENT.  
 Jan. 17, 1724.

The Lords Found, "That by the foresaid reservation the younger children's rights stood really affected with the debts contracted in consequence of the faculty, and preferred the creditors."

The children having reclaimed, the Court "Adhered."

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*Land may be conveyed to one party under burden of a power reserved to another party to burden with debt, and an infeftment granted by the party in whose favour the power is reserved, although himself uninfeft, is effectual.*

ANDERSON v. YOUNG AND TROTTER.

Dec. 24, 1784.  
 NARRATIVE.

IN 1779 Catherine Innes purchased an heritable subject, and took the title to it, not in her own name, but in the name of David Hill, in trust and for behoof of herself in liferent, and her children in fee, reserving to herself power without the consent of her trustee, or of her children, to burden, sell, and dispoise, or give away any part of the subjects conveyed. On this disposition infeftment followed in David Hill's favour; and in the sasine the reserved power was specially engrossed.

She afterwards, without the concurrence of the trustee, granted an heritable security over it in favour of the pursuer, on which he was infeft. Posterior to this deed, she, along with the trustee, granted another heritable security in favour of the defenders, on which infeftment also followed. An action of reduction was thereafter brought by the pursuer, seeking to have the heritable bond in favour of the defenders reduced; at least to have it declared, that in consequence of the disposition and

conveyance in his favour, he was preferable upon the subjects thereby conveyed to the defenders, and concluding farther, that the debtor and her trustee should be ordained to grant such deed as might be judged necessary for his security.

ANDREWS  
v.  
YOUNG  
AND  
TRUTTAL.  
1784.

PLEADED FOR THE PURSUER.—The subject in question was truly the property of Catherine Innes, she holding it by her trustee. There was a faculty in Catherine Innes amounting to the full powers of property. It makes no difference whether the faculty be contained in a deed flowing from another, or be reserved in one granted by the party himself. In either case the feudal right stands in the person of another. But still the infeftment of that other must be construed as an infeftment for behoof of the person for whom the faculty is created or reserved, if it appears upon the face of the Records that it was merely a trust in the nominal disponent. Here it was expressly declared that David Hill's infeftment was for behoof of Catherine Innes, and that she was to have right to burden, sell, or dispose of the subject. His infeftment was therefore in the sound construction of law her infeftment.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE DEFENDERS.—The question is, Whether a valid heritable security in favour of the pursuer could be created without infeftment, or which is the same thing, by an infeftment taken on a precept granted by a party who was never infeft in the subject? It is admitted that Catherine Innes was the proprietrix of the subject in question, and that Hill was her trustee. But to suppose that his infeftment was on that account the same with hers is to contradict one of the least doubtful rules of law regulating the practice of denuding trustees. Some rights, it is true, are nominal, and others substantial, yet that is no reason why a feudal right, when created in the person of a trustee, should pass into that of the true proprietor without any transference at all. It was by delivery of the subject that the present trustee was vested with his right; and without re-delivery he cannot be divested. It is impossible to find that the bond in favour of the pursuer is a valid security, without overturning the whole forms laid down for the transmitting or burdening heritable subjects, which have been justly

ARGUMENT FOR  
DEFENDERS.

ANDERSON  
v.  
YOUNG  
AND  
TROTTER.  
1784.  
JUDGMENT.  
Dec. 24, 1784.

considered as so necessary to render property and the rights of creditors secure and permanent.

LORD KENNET, Ordinary, "Repelled the reasons of reduction, and assoilzied the defenders from the conclusion of the reduction."

The pursuer having reclaimed, the Lords "Altered in respect of the reservation in the right to the trustee, and preferred the pursuer."

OPINIONS.  
MS. Notes,  
Lord Swinton's  
Session Papers.

LORD BRAXFIELD observed,—“There was no wrong here, and no need of the reduction. So far the Ordinary is right. But the right to the trustee is burdened with a reservation to the truster, and therefore this is a quality in the right to the trustee ; and therefore her exercise of the faculty is good, and her security good and preferable to that given to the defenders.”

## SECTION III.

## GROUND-ANNUALS.

*Ground-annuals follow the Land, and do not remain personal on the original Disponee after he has been divested.*

## I.—PEDDIE'S HEIRS v. SOOT'S TRUSTEES.

IN 1829 Andrew Peddie conveyed certain burgage subjects in Dundee to James Soot, his heirs and assignees, in consideration of his becoming bound "to pay to him, his heirs and successors, the ground-annual or yearly sum of £150, and on condition that the same should be declared a real burden over the subjects conveyed, in manner after written." This manner was, that the burden should "be engrossed in the infeftment to follow hereon, and in all future transferences or investitures in the said subjects, or of any part thereof," under the sanction of nullity. The deed further contained a personal obligation by Soot, "his heirs, executors, and successors, to make payment to the said Andrew Peddie and his foresaids, of the foresaid ground-annual or yearly sum of £150 sterling, and that at two terms in the year, Martinmas and Whitsunday, by equal portions." On this deed Soot was infeft *more burgi* under the burden of the ground-annual.

Feb. 27, 1840.

NARRATIVE.

After Soot's death, his trustees, in 1836, disposed the subjects to Peter Borrie, and his heirs and assignees. The disposition narrated the conveyance to Soot, and the burden of the



PEDDIE'S  
HEIRS  
v.  
SOOT'S  
TRUSTEES.  
1846.

ground-annual under which it was made, and conveyed the subjects to Borrie, under the declaration "that they shall be burdened, and they are hereby disponed with and under the burden of a ground-annual, or yearly payment of £410 sterling, to be paid furth thereof," to them or their assignees. The deed further declared that there was included in this ground-annual of £410 sterling, the ground-annual of £150 sterling, payable to the said Andrew Peddie under the original deed; and the ground-annual or yearly payment of £410 sterling, including interest and penalty, were declared to form a real and preferable burden upon and affecting the subjects disponed; under which real and preferable burden of £410, the subjects were declared to be disponed, and not otherwise. Borrie and his fore-saids were specially taken bound to pay the ground-annual of £150, payable to Peddie, from and after the term of Whitsunday 1836. There was a personal obligation by Borrie, and his heirs, executors, and successors, and certain cautioners, to pay the full ground-annual of £410: and there was further a declaration, "that in case the said ground-annual of £150 should be duly paid by the said Peter Borrie, and Thomas Adamson, and John Anderson," (the cautioners,) "and their foresaids, to the said Andrew Peddie and his foresaids, and a sufficient discharge obtained therefor, and delivered to the said trustees, then for such year or term, instead of the foresaid sum of £410, there shall be payable to the said trustees, or their foresaids, only £260 sterling." Borrie the disponsee was duly infeft.

In June 1837, the complainers, Soot's trustees, sold the surplus ground-annual of £260 at 20½ years' purchase to George Moon. The disposition and assignation granted by them, in its dispositive clause, conveyed to Moon the ground-annual of £410, but declared that the original ground-annual of £150 was included therein. This disposition was intimated to Borrie on 17th October 1838. Moon was infeft on the 23d of that month; and in December 1839, he again, by disposition and assignation, transferred his right to the Eastern Bank, who were infeft in February 1840.

Borrie, the proprietor of the subjects, having become bankrupt, and the half-year's ground-annual due to Peddie's heirs, he himself being dead, remaining unpaid, his heirs raised an

action in the Sheriff-court of Dundee against Soot's trustees and executors therefor, and for the future termly payments as they fell due, on the ground that upon the true construction of the original contract and disposition, Soot and his representatives continued personally liable for the ground-annual thereby constituted, even after they had been divested of the subjects in respect of which it was payable.

PEDDIE'S  
HEIRS  
r.  
SOOT'S  
TRUSTEES.  
—  
1846.

Soot's trustees pleaded in defence, that the obligation to pay the ground-annual followed the proprietorship of the subjects in respect of which it was payable, and that having been divested of these by a *bona fide* conveyance, their obligation ceased.

The Sheriff pronounced the following interlocutor :—“ Finds Interlocutor of Sheriff. it instructed by the extract, registered contract, and disposition produced, dated 31st January 1829, entered into between the late Andrew Peddie of Bankhead, on the one part, and the late James Soot, merchant in Dundee, on the other part, that the said Andrew Peddie agreed to sell and dispoise the subjects therein mentioned to the said James Soot, his heirs and assignees, in consideration of the latter becoming bound to pay to the said Andrew Peddie, his heirs and successors, a ground-annual of £150 sterling : which, by the deed, is declared a real burden over the subjects conveyed : Finds that the foresaid ground-annual was not only declared by the deed a real burden over the subjects conveyed, but it likewise contained a personal obligation, whereby the said James Soot bound and obliged himself, his heirs, executors, and successors, to make payment to the said Andrew Peddie, and his foresaids, of the said ground-annual, at Martinmas and Whitsunday, by equal portions, commencing at Martinmas 1830, and so forth half-yearly and termly in all time thereafter : Finds it admitted, that Mr. Soot completed his title to the property by infeftment, and that he afterwards, during his lifetime, paid the ground-annual stipulated in the contract : Finds it also admitted, that Mr. Soot died in April 1836, leaving a trust-disposition and settlement of his whole estate and effects in favour of the defenders, who represent him as trustees, and who, while in possession of the property, continued to pay said ground-annual : Finds it stated by the defenders, that soon after Mr. Soot's death, they sold the property to Peter Borrie, engineer in Dundee, for a

PEDDIE'S  
HEIRS  
v.  
SOOT'S  
TRUSTEES.  
1846.

further and additional ground-annual of £260, payable to themselves ; that they afterwards sold their surplus ground-annual to Mr. George Moon of Russell Mill, in Fife ; and that he again has conveyed his right to trustees for the Eastern Bank of Scotland : Finds it not alleged that the pursuers were in any way parties to these last-mentioned conveyances ; and finds it admitted that Mr. Borrie has become bankrupt : Finds that the subsequent conveyances by the defenders and their disponees, but to which the pursuers were no parties, do not affect the validity of the foresaid personal obligation come under by James Soot and his representatives to pay the first mentioned ground-annual in terms thereof, and as stipulated in the contract ; and that the pursuers are entitled to operate payment thereon from the defenders of the ground-annual in arrear, now sued for : Finds that, by enforcing payment upon the personal obligation, the pursuers cannot be held in any way to have relinquished their right to recover their ground-annual from the subjects over which it is declared a real burden ; because by the contract, the personal obligation and the real burden do not prejudice, but strengthen each other ; and that the pursuers may, if necessary, act upon either or both, to the effect of recovering full payment : Repels, therefore, the pleas maintained in defence, and decerns against the defenders in terms of the libel ; finds the pursuers entitled to expenses."

The defenders having advocated, Lord Wood, Ordinary, ordered minutes of debate.

ARGUMENT FOR  
ADVOCATOR.

PLEADED FOR THE ADVOCATOR.—The point at issue is,—Whether the original debtor in a ground-annual is relieved of future liability by a sale and transfer of the property to a *bona fide* purchaser ? Or in other words,—Whether the personal liability of the original obligant, his heirs and representatives, for a ground-annual continues undiminished and unaffected, notwithstanding that the property itself has passed by fair and regular transmission into the hands of third parties, who, as possessors, are also personally liable ?

By the contract of ground-annual there were created two distinct rights in the subject conveyed. The one was a per-

petual reserved real right to the ground-annual in question. The other was a right to the property burdened with the ground-annual. According to the true import and legal effect of the transaction, the right to demand the ground-annual belongs to the party who for the time is the owner of the former of these rights, and the obligation to pay the ground-annual is incumbent only on the party who for the time is owner of the latter of these rights.

There might have existed a personal bond or obligation to pay the ground-annual over and above and separate from the right of ground-annual itself; and such a bond and obligation might be so conceived as to make the debtor and his representatives liable so long as it continued unextinguished. Such a bond and obligation, however, would in itself be altogether different from a proper right of ground-annual. The circumstance that it related to a ground-annual could not invest it with the nature of that right. A right of ground-annual, and a separate bond or obligation for payment of it, are two things very different, and requisite to be carefully distinguished.

No such separate bond or obligation was granted by the original disponent in the lands. In the present case there is simply a right of ground-annual constituted in the ordinary way. It is true that the original disponent was taken personally bound to pay the ground-annual. But so also is a disponent in a proper feu-contract. In neither case, however, is the obligation the same as that undertaken by a debtor in a debt heritably secured. In the case of an heritable debt the real right is merely accessory to the personal obligation; and on the personal obligation becoming satisfied, the real right comes to an end. A right of ground-annual is of quite a different nature. It is a perpetual right. It cannot be paid up or extinguished at the discretion of the disponent, or by any act of his alone. A right of ground-annual is analogous in all its features to a sub-feu. The vassal in possession of the lands is alone liable for the feu-duty; and on the original vassal conveying the lands to another, the latter alone is liable, and the former vassal becomes free. On the same ground the advocates have become free of the ground-annual in question. They have ceased to be owners, and have now no right to the rents of

PEDDIE'S  
HEIRS  
r.  
SOOT'S  
TRUSTEES.  
1846.

PEDDIE'S  
HEIRS  
v.  
SOOT'S  
TRUSTEES.  
—  
1846.  
ARGUMENT FOR  
RESPONDENTS.

the lands. They have therefore also ceased to be liable for the ground-annual, which is a burden on the lands.

PLEADED FOR THE RESPONDENTS.—A ground-annual right is no other in principle than a reserved real burden. In judging of it, the same principles are to be followed as in the case of burdens by reservation. It cannot touch the substantial nature and effect of the right as a real security, that the object of the reservation is to provide for the payment of an annual, and not of a capital sum. A party may bind himself, his heirs, and successors, for payment of a perpetual annuity as effectually as for payment of a capital sum. As regards the real security, in the one case, as in the other, it is through the constitution of a real burden by reservation.

There is no mystery in the use of the term ground-annual. The real security thereby afforded is, in its legal nature and effect, no other than the creditor would have under a real burden for the corresponding amount of capital. The personal obligation also is equally effectual in the one case as in the other; and the real security being of the same precise nature, there is no room for the distinction attempted on the other side. A personal obligation for payment of the price is not impaired by the creation of a security to make certain its fulfilment. On the purchaser disposing of the lands to a third party, the personal obligation remains entire against the first purchaser and his representatives. The real security held by the creditor does not affect the validity of the personal obligation.

So it is in the present case. The express personal obligation contained in the original contract affords a conclusive answer to the plea, that the alienation of the subjects by the original disponent has extinguished the personal obligation to pay the ground-annual. That personal obligation was not under the original disposition inseparably united with the ownership and possession of the lands. Although, therefore, the original disponent has parted with the lands, he still continues bound under his personal obligation. The original disponent was no party to the conveyance by the original disponent. The personal obligation of the original disponent still remains, therefore, undischarged.

LORD WOOD, Ordinary, pronounced the following interlocutor :—" Advocates the cause—alters the interlocutors complained of—assoilzies the complainers from the conclusions of the action at the instance of the Respondents—and decerns ; and finds the complainers entitled to expenses, both in the Inferior Court and in this Court, but subject to modification."

PEDDIE'S  
HEIRS  
r.  
SOOT'S  
TRUSTEES.  
1846.

The Respondents having reclaimed, the Court, after hearing counsel, remitted the pleadings to the whole Judges for their Opinions in writing, on the question, " Whether the interlocutor under review ought to be adhered to or altered ?"

LORD WOOD returned the following Opinion :—" On 31st January 1829, Andrew Peddie, the predecessor of the respondents, disposed to Soot, ' his heirs and assignees,' certain burgage subjects for a ground-annual of £150, payable to Peddie, ' his heirs and successors,' which is declared a real burden on the subjects conveyed ;—and it is provided, that it ' shall accordingly be engrossed in the infeftments to follow hereon, and in all future transferences or investitures in the said subjects, or of any part thereof,' under the sanction of nullity. There is also a personal obligation by Soot, ' his heirs, executors, and successors,' to make payment of the ground-annual to Peddie and his foresaids, at the terms of Whitsunday and Martinmas.

OPINIONS.  
Lord Wood.

" On this disposition Soot was infeft, *more burgi*, under the burden of the said ground-annual, and in terms of the said obligation.

" The complainers, Soot's trustees, disposed the subjects in October 1836, to Peter Borrie, his heirs and assignees. The disposition recites the conveyance to Soot, and the burden of £150 of ground-annual, under which it was made. It disposes and conveys the subjects to Borrie, under ' the burden of a ground-annual or yearly payment of £410, to be paid furth thereof,' to them or their assignees ; ' but declaring, that there is included in this ground-annual of £410 the ground-annual of £150, payable to the said Andrew Peddie,' and ' which ground-annual or yearly payment of £410 sterling, including as aforesaid, with interest and penalty, as before and after mentioned, are hereby declared to form a real and preferable burden upon and affecting the said subjects hereby disposed, under which

PEDDIE'S  
HEIRS  
v.  
SOOT'S  
TRUSTEES.  
1846.

real and preferable burden of £410, the said subjects are hereby disposed, and not otherwise.' Borrie and his foresaids are specially taken bound to pay the ground-annual of £150, payable to Peddie, from and after the term of Whitsunday 1836. There is a personal obligation by Borrie, and his heirs, executors, and successors, and certain cautioners, to pay the full ground-annual of £410. And there is further a declaration, 'that in case the said ground-annual of £150 should be duly paid by the said Peter Borrie, and Thomas Adamson, and John Anderson, (the cautioners,) and their foresaids, to the said Andrew Peddie and his foresaids, and a sufficient discharge obtained therefor, and delivered to the said trustees then for such year or term, instead of the foresaid sum of £410, there shall be payable to the said trustees, or their foresaids, only £260 sterling.' Borrie the disponent was duly infeft.

"In June 1837, the complainers, Soot's trustees, sold the foresaid surplus ground-annual of £260 at 20½ years' purchase, or upwards of £5000, to George Moon. The disposition and assignation granted by them, in its dispositive clause, conveys to Moon the ground-annual of £410, but declaring that the original ground-annual of £150 is included therein. This disposition was intimated to Borrie on 17th February 1838. Moon was infeft on the 23d of that month; and in December 1839, he again, by disposition and assignation, transferred his right to the Eastern Bank, who were infeft in February 1840.

"By the disposition in favour of Borrie, Soot's trustees had entirely divested themselves of the land, which remained charged with the ground-annual, payable to Peddie, his heirs and successors, with which it had been originally burdened. The only interest which they retained was in the ground-annual, which substantially extended merely to the additional sum which had been charged on the land on conveying it to Borrie; and, as has just been stated, they, by disposition and assignation, conveyed this interest to Moon, which, being a reserved burden, was transmissible without infeftment, although it appears that Moon did take infeftment in the accustomed manner in a burgage holding.

"It is admitted that all the ground-annuals due and payable during the possession of the subjects by the complainers, (Soot's

trustees,) or till the date of the foresaid transference to Moon, have been paid ; and the question is, Whether the complainers still remain personally liable to the extent of the original ground-annual in all time coming, as it may fall due ?

PENNIE'S  
HEIRS  
v.  
SOOT'S  
TRUSTEES.  
1846.

“ This question may be first considered upon the footing that the complainers had simply made over, and divested themselves of the subjects, with the burden of the original ground-annual, without reference to the specialty said to arise in consequence of the complainers not having done so, but having conveyed the subjects with the burden of a larger ground-annual declared to include the original one, but which is made payable to them ; and, secondly, with reference to the alleged specialty.

“ *First*, There is no doubt that according to the deeds, Borrie and the lands continue liable for the original ground-annual. But are the complainers and the heirs and executors of Soot also liable ? Does an obligation arise against them in perpetuity from Soot having taken the lands, with the charge of the annualrent burden, and the personal undertaking to pay it, expressed as it is in the deed by which the lands were conveyed to him, his heirs and assignees, so that the obligation shall not be dissolved by the disponent or his heirs divesting themselves of the lands—which, by the right conferred, there was an absolute and uncontrolled power of doing—but shall continue onwards through whatever number of hands the lands may in future pass ?

“ A ground-annual, in its own nature, is a right in connexion with land, charged upon it, and payable out of it. It has reference to the land on which it is laid, and not to any separate personal obligation on the proprietor, as for a debt exigible from him. Its primary and essential character is, that of a debt by the land and its fruits. The heritor is only bound in respect of his possession of the heritage charged with the ground-annual. It cannot subsist as a mere personal right. Both in its constitution and transference, it is inseparably connected with real estate.

“ Accordingly, in its ancient form, the deed—the condition or *reddendo* of which was a ground-annual—was unilateral. No personal obligation was expressed. Thus even in two recent cases, the deeds were unilateral, without any personal or coun-



PEDDIE'S  
HEIRS  
r.  
SOOT'S  
TRUSTEES.  
1846.

ter obligation ; Thomson, 12th February 1828 ; Magistrates of Inverness, 28th November 1827 ; and specimens of the old form are to be found in chartularies. Hence the land alone was directly bound in payment of the ground-annual. It warranted no immediate proceeding against the proprietor. It did not give an active title to enter into possession by a process of maills and duties. The ground-annual was levied by a poinding of the ground, and adjudication might be led for it and for arrears, the debt being previously constituted, as to which the *pari passu* preference of the Act 1661 is specially excepted. Any personal claim arose only against the heritor or others as intromitters with the rents or moveables, from which payment might be directly levied by action of poinding. Accordingly, in the case of Moncrieff, 24th November 1835, (Shaw, XIV. p. 61,) it was found that arrears of a ground-annual bore no interest where interest was not expressly stipulated for, it being held that the same rule applied to them as to arrears of feu-duties, on which no interest is due unless covenanted, even when the deed contains an accessory personal obligation for payment of the duties themselves ; and this assumes that, by the original nature of the right, there is no personal obligation for the ground-annual, in which the proprietor is debtor.

“ Keeping in view what has now been stated, it will be observed, that, in the present case, the ground and basis of the deed by Peddie in favour of Soot, while it conveys the lands contained in it to him, and his heirs and successors, is to constitute a proper ground-annual ; that is, a charge which is to attach to the lands, go into whatsoever hands they may, (for a transference to other parties, and their substitution for the original disponent, is contemplated, and the event, as regards the perpetuity of the burden on the lands, is duly provided for,) and to which charge, so constituted, Peddie, and his heirs and successors, should have right in all time coming. By the nature of the right thus created,—and the creation of which is in terms of the deed, its primary and fundamental object,—it is clear that Peddie or his heirs, or the party to whom the ground-annual might be transferred, could have no claim for its payment except against the lands, or the possessors thereof, or intromitters with the rents and profits. Possession ceasing by

a divestiture of the lands, the ground-annual, as respects the party so divested, ceases also. By disconnecting himself with the lands on which it is charged, he, at the same time, equally disconnects himself with the ground-annual itself for all terms falling due thereafter.

PEDDIE'S  
HEIRS  
v.  
SOOT'S  
TRUSTEES.  
1846.

“ But then, by the deed, Soot bound ‘ himself, his heirs, executors, and successors,’ to pay the stipulated ground-annual. This personal obligation is an addition to the old form of deed constituting the right to a ground-annual made upon the recent re-introduction of that description of right or security which had got so much into disuse that Erskine declares his ignorance of it in practice, (Ersk. II., 2, 5 ;) and the point is, Does this create a separate obligation, which is to subsist as a distinct and independent one, after the lands charged with the ground-annual have been conveyed to a third party, and therefore to exist apart altogether from the proper right, and the claims thence arising to the holder of it ? While the original disponee retained the lands, the lands and the disponee remained bound for the ground-annual. Was it the purpose of the deed, by the addition of the personal obligation, to produce this result,—that if the lands were conveyed to a third party under the original condition or burden, and with an obligation upon him to pay the ground-annual, the party having the right of ground-annual should then not only hold the ground-annual as it stood, (with a change merely in the proprietor of the lands,) but that he should be at the same time a creditor for the amount of the ground-annual against the first disponee, and his heirs and executors, as debtors therein, under a distinct and independent perpetual undischageable personal obligation ? And not only so, but (for the doctrine contended for would seem to carry the matter this length) that if the lands with the burden were transmitted to succeeding disponees, he should be a creditor to each of them in succession, and their heirs, under the personal obligation come under by each, not merely while the disponee and his heirs were in possession, but after they were entirely divested of the lands, and had thereby terminated their connection with them. I do not think that this is the legal construction of the deed. On the contrary, I think that the deviation from the old form of deed, by the addition of the personal obli-

PEDDIE'S  
HEIRS  
r.  
SOOT'S  
TRUSTEES.  
1846.

gation, had a very different object in view, and in conformity to which it must be construed in determining the effect which it is to receive.

“ It appears to me, that the sole object of the addition of the personal obligation was to afford to the annualler a more simple and easy mode of enforcing payment from the proprietor of the lands for the time being, of the ground-annuals falling due during his possession, than, apart from it, it would have been open to him to adopt. I have already stated the remedies which, by the nature of the right and the old form of the deed, were competent. They were expensive and troublesome. But, by the personal obligation, a power was given of going against the proprietor directly upon it, instead of having only the power of poinding the ground, or adjudging, or proceeding against him personally for the sum due, in respect of, and to the extent only of actual intromissions with the lands or rents. The personal obligation is directed against the disponent, ‘ his heirs, executors, and successors,’ applying to the disponent while he continued proprietor ;—to the heir who may succeed to the lands, (which he can only do subject to the burden of the ground-annual during his possession ;)—to the executors, against whom it gives a personal claim for arrears arising during the possession of a proprietor deceasing, and remaining unpaid ;—and to successors, or parties taking the lands by singular title. This satisfies the words ; and, with reference to the circumstances, it is their sound construction. The personal obligation is not the primary one. It is a mere accessory to the real burden, or original and independent right of ground-annual constituted by the disponent in favour (as may be) either of himself (which is the case here) or a third party, over the lands charged with it. It is intended to supply the means of more easily enforcing the claim which, in respect of the right of ground-annual, the annualler has against the proprietor of the lands, whoever he may be—the facility provided being given against the original disponent, and all others into whose hands the lands may pass—but it is only to enforce that claim as constituted in connexion with the lands, and as running along with and against them, and not to create a claim which shall stand as a separate and independent one against parties whose connexion with the lands has entirely

ceased, and who could only be proceeded against upon the footing of their being debtors under the personal obligation as one distinct altogether from the proper ground-annual charged upon the lands burdened, and the claims arising out of it. In short, as it appears to me, the personal obligation was introduced in these rights when revived in practice, in order to make them form what might serve as a substitute for a sub-feu, where that description of right could not be resorted to, by affording the same facilities for recovery of the ground-annual in the one as of the feu-duty in the other. This becomes the more evident, when the attempt at a still nearer assimilation of the two, exhibited in the additional provisions inserted in the disposition by the complainers to Borrie, is attended to, which provisions are also to be found in the original ground-annual right, dated in 1834, in the case of Gardyne lately before the Court, and which, I have no doubt, occur in deeds of an earlier date than any of those referred to.

“ By the disposition in favour of Borrie, it is provided, *first*, That if two years’ ground-annual shall remain unpaid, the disposition shall become null and void, as if it were a regular feu-right; and, *second*, That it shall be lawful to poind for payment of the arrears, notwithstanding the enforcement of the irritancy. Now, although there might be difficulty in regard to the mode of carrying these provisions into effect, it is obvious that they apply to the possessor of the subjects only, and that they were intended merely to afford more ready access against whoever is the vassal in the lands. But the personal obligation and these provisions are all part of a progressive change in the form of the deed, tending to one and the same end, and not to the perpetuating a responsibility for the ground-annual after a divestiture of the lands has taken place.

“ The right of ground-annual in all this partakes of the history of a feu. A feu-charter originally was a unilateral deed, which conveyed the subject for payment of a certain feu-duty. The superior could levy the feu-duty by a poinding of the ground as a *debitum fundi*, or by a personal action of constitution against the vassal; or he might recover the feu, but then he lost his right to the arrears. It was wished to get readier access to the payment of the duty, as well as to forfeit without

PEDDIE'S  
HEIRS  
r.  
SOOT'S  
TRUSTEES.  
—  
1846.

PEDDIE'S  
HEIRS  
r.  
BOOT'S  
TRUSTEES.  
1846.

losing right to arrears. The feu-contract was adopted which first bound the vassal, his heirs, executors, and successors, to pay the feu-duty, (*Juridical Styles*, vol. i. p. 34.) with a clause of registration, on which a charge could be given without any previous constitution of the debt against the vassal; and then there came a provision of irritancy, and another, that in the case of an irritancy declared the arrears might still be recovered.

“Now all these clauses, in a feu-right, apply to the possessor of the lands alone. If the vassal disposes of the property, and another is vested in it, the original contracting party does not remain bound under his personal obligation—it is merely accessory, and intended to gain greater facilities of levying the feu-duty from the persons possessing the subject which is bound—the land is the true debtor. And why should the rule be different in the case of a ground-annual right? In it the land is also the true and primary debtor—the deed contemplates that the land so burdened may, without the control of the annualer, be transferred to a third party—and the personal obligation being not primary but accessory, there is nothing in principle any more than in a feu-right—but quite the reverse—why the third party substituted, by the act of the original disponee, as the proprietor of the land which is bound by the primary obligation, should not also, by that act, be substituted as the party debtor in the personal and accessory obligation.

“The same process which occurred in feu-rights has taken place as to a lease, at one period a unilateral deed. There, a personal obligation for the rent was added, when other stipulations were exacted from the tenant. He assigns his right, and the assignee is admitted into possession. It is now held that the cedent does not remain bound.—*Skene*, 20th May 1825, (4 *Shaw*, 26.)

“I shall only add upon this part of the case, that the points of dissimilarity between a right of ground-annual, and a security for debt by bond and disposition in security, equally with those of similarity to the feu-disposition and lease, confirm the view I take of the import and effect of the personal obligation founded on by the respondents. In the case of the bond and disposition in security, the personal obligation to pay is the

primary and regulating clause of the deed. The party is the primary and proper debtor. The heritable subject is conveyed in further security only ; it is the accessory. The continuance in force of the security depends upon the continuance of the personal obligation. The obligation is not of a permanent kind, but may at any time be redeemed and extinguished by payment. In one and all of these particulars, the ground-annual right stands in direct contrast to the bond and disposition in security ; and the like opposition will be found on comparing it with other forms of security for debt.

“ Upon the whole, taking the case apart from the alleged specialty, I am of opinion that the complainers are not liable for the ground-annuals claimed from them.

“ 2. But it is contended that, assuming that in the ordinary case of a simple conveyance of the lands to another party, with the burden of the original ground-annual, no claim for the ground-annuals subsequently would have come against the complainers, still by the form in which they transacted with Borrie, they not only continued personally bound for the ground-annuals falling due to the respondents, while the improved ground-annual, including the first, remained payable to them, but even for those falling due after they executed the disposition and transference in favour of Moon, and surrogated and substituted him in their place.

“ In the first place, notwithstanding the terms of the complainers’ disposition in favour of Borrie, the respondents were entitled to go directly against the lands, and against Borrie, or his successors, as possessors of the lands, for payment of the original ground-annual due to them. This is even provided for in terms, by the clause already referred to, of the disposition in favour of Borrie. But the right of the respondents against the lands must have remained entire, whatever had been the terms of the complainers’ disposition to Borrie.

“ In the second place, the mere obligation by Borrie to pay the whole ground-annual—additional and original, to the complainers, but the former of which alone belonged to the complainers, did not, it is apprehended, raise any obligation in favour of the respondents as against the complainers. The clauses of the deed do not contemplate that such an obligation

PEDDIE’S  
HEIRS  
v.  
SOOT’S  
TRUSTEES.  
1846.

PEDDIE'S  
HEIRS  
v.  
BOOT'S  
TRUSTEES.  

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1846.

was to be thereby raised, but quite the reverse ; and it is not done. Suppose no payment made by Borrie to the complainers of the original ground-annual of £150, falling due at any particular term, (which, as has been seen, the deed has in view may be the state of the fact, and provides for accordingly,) could the respondents have demanded payment of it from the complainers, in respect of the provision in the disposition to Borrie, in regard to the payment of the whole ground-annual of £410 ? It is thought that they could not. The answer would have been sufficient. The ground-annual has not been paid to us. We do not claim payment of it, and have not interfered with lands or the moveables upon them. Your original right to go against them and the possessor remains entire, and therefore it is to them, and not to us, that you must look for recovery of the amount due. Then if, in that case, the respondents could not have come against the complainers for the original ground-annual, under the obligation by Borrie to them for the whole ground-annual of £410, and in respect of it simply, (which obligation still left Peddie and the respondents, his representatives, right to go against the lands, or Borrie entire, and which is qualified and explained in the manner already stated as to Borrie paying the original ground-annual to Peddie, or his representatives,) is there anything in the terms of the disposition to Borrie which can be held to have preserved as against the complainers the personal obligation undertaken by them to Peddie and his representatives in the disposition granted by Peddie ; which obligation, *ex hypothesi*, would, in the ordinary case, have been discharged by the complainers divesting themselves of the lands ? I can discover no ground upon which this can be maintained. Assume that the complainers had executed a deed, discharging the obligation in the disposition to Borrie to pay the ground-annual to them, in so far as regarded the original ground-annual, and declaring that it should be limited to payment of the surplus ground-annual only, it is conceived that it would not have been possible for the respondents to object ; and to say that by the form in which the deed had been at first executed, a responsibility to the respondents for the original ground-annual had either been imposed upon the complainers directly, or continued under the obligation in the

disposition by Peddie to them, of which they could not, by such a discharge, relieve themselves. But if they could not say so, this shows that in truth no such responsibility ever was created as matter of obligation arising, directly and without anything further, out of the mere provisions of the deed, or indirectly, by keeping alive the personal obligation in the conveyance by Peddie, constituting the ground-annual.

PEDDIE'S  
HEIRS  
r.  
SOOT'S  
TRUSTEES.  
1846.

“ In the third place, if I am right in what has now been stated as to the nature and effect of the provision in the disposition by the complainers to Borrie, in regard to the payment of the whole ground-annual to them, it follows that a responsibility by them to the respondents for the original ground-annual could only have arisen in respect of their having, in consequence of that provision or obligation, interfered with the subjects liable in payment of it, or intromitted with that ground-annual, by taking payment of it from Borrie. Then, no doubt, they would have been liable for it to the respondents. But they would have been liable for it, either in respect of their interference, or as for money received for the use of the respondents, and not on the ground either of the naked obligation which they had taken from Borrie to pay them the full ground-annual, or of their having thereby preserved in force their own original personal obligation in Peddie's disposition in their favour to pay the original ground-annual to him or his representatives.

“ In the fourth place, it follows, from what has been already said, that, although prior to the conveyance by the complainers to Moon, they might, by their acting upon the obligation taken from Borrie, or intromitting with the ground-annuals due to the respondents, have incurred a liability for them, after that conveyance, all possible pretence of claim against them for any portion of these ground-annuals subsequently falling due must have ceased ; and the ground-annuals in question are admittedly of that description.

“ For these reasons alone, I think the specialty founded on by the respondents does not afford any ground for holding that the complainers, even prior to the conveyance by them to Moon, continued directly liable to the respondents for the original ground-annual, although they did not intromit or take



PEDDIE'S  
HEIRS  
v.  
SOOT'S  
TRUSTEES.  
1846.

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PEDDIE'S  
HEIRS  
r.  
SOOT'S  
TRUSTEES.  
1846.

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PEDDIE'S  
HEIRS  
v.  
SOOT'S  
TRUSTEES.  
1846.

any steps for obtaining payment of it. But while I have considered it right to state this view of the question, as one which appears to me to be well-founded, I do not hold the adoption of it essential to the relief of the complainers from the respondents' demand; because, supposing it were attended with doubt, then—

“ In the fifth place, and assuming that by the terms of the disposition to Borrie, and apart from intromission by the complainers, or anything else done upon the obligation by Borrie to pay the entire ground-annual to them, the original ground-annual might have been claimed from them, while they continued to hold the rights reserved by that deed, I am clearly of opinion that it was a liability, which it was perfectly competent to put an end to, by transferring these rights to another party, as was done by the disposition and assignation executed by the complainers in favour of Moon, who thereby, both as to benefits and responsibilities, came into their room and place. There was no privity between the complainers and respondents in the transaction with Borrie, nor any necessity or occasion that there should be so. It and the deed carrying it into effect were entirely between the complainers and Borrie. On the other hand, the personal obligation in the disposition by Peddie to the complainers was *ex hypothesi* merely an accessory obligation dischargeable or extinguishable by the complainers divesting themselves of the lands. Accordingly, by the disposition to Borrie, they did divest themselves of the lands, which therefore operated an extinction of the obligation as originally constituted—that is, an accessory personal obligation against the party possessing the lands. But if the terms of the disposition to Borrie interposed a bar to their being at once entirely freed of all obligation for the original ground-annuals subsequently falling due, and these ground-annuals could in consequence be directly claimed from them, the obligation so arising could not, it is apprehended, be a permanent unextinguishable obligation, but only one to last during the period of the complainers continuing *in titulo* of the obligation taken by them from Borrie, to pay to them the full increased ground-annual out of which it arose; and therefore I conceive, that by executing the disposition and transference in favour of Moon

they completely terminated, and put an end to all responsibility on their part for the original ground-annual payable for terms to come thereafter."

LORD JUSTICE-CLERK HOPE.—" I concur in the opinion of Lord Wood on the general ground stated in the first part of that opinion. I wish to explain that my opinion rests entirely upon the general ground stated by his Lordship.

" The plea maintained by Soot's trustees is, that their assignation and conveyance to Moon of the right to draw the additional ground-annual, including what was due to Peddie, ' liberated them from their original liability ' to pay the ground-annual to Peddie, who constituted the right in favour of Soot. They do not rest their defence on any other ground, for until that assignation was granted, they say they could not maintain that they were free. I think that an unsound view of their case. But if not liberated by the conveyance of the land to Borrie, and if a separate personal obligation was imposed subsisting independently of the right to the land remaining with the first disponent, I am not able to perceive on what principle the parties could relieve themselves of such personal obligation. If the parties, by the disposition of the subject to Borrie, could not thereby free themselves of the direct obligation to pay the original ground-annual, in respect that it is to be held that the obligation was one personally undertaken by Soot, and not dependent on his heirs and representatives retaining the land, but an independent personal obligation, then, on that supposition, I cannot hold that by any deed with third parties they could free themselves of that obligation, upon that view of its character and effect, and substitute another debtor in the personal obligation without the concurrence of the creditor.

" On the other hand, I think it as clear that Peddie's heirs have no concern with the state of the rights as between Soot's trustees and Borrie for an additional ground-annual, and cannot found on these deeds. As Lord Wood states, Borrie was clearly liable, by accepting the right to the land, for the ground-annual to Peddie under burden of which alone he could acquire it. If he paid that ground-annual to Soot's trustees without having receipts from Peddie reported, he would be liable to pay it again ; for he was necessarily liable to pay it as in the right

PEDDIE'S  
HEIRS  
c.  
SOOT'S  
TRUSTEES.  
1846.

Lord Justice-  
Clerk.

PEDDIE'S  
HEIRS  
v.  
SOOT'S  
TRUSTEES.  
1846.

to the land. Peddie's right to recover follows the holder of the land ; that is his security, and, at the same time, the measure and extent of his right. By the conveyance of the land to Borrie, I think Soot's trustees were completely freed from liability for the ground-annual under which Peddie disposed originally the land, and therefore that Peddie's heirs cannot found on any arrangements between Soot's trustees and Borrie. If the former had drawn the ground-annual payable to Peddie from Borrie, and the latter could not pay it again, Soot's trustees would have to pay it in that case, but on a ground quite distinct from liability under the original grant.

" But if the general ground stated by Lord Wood is not sound, and if Soot's trustees, by the form of their conveyance of the land to Borrie, remained liable, I do not think that they could afterwards relieve themselves by the assignation to Moon. For if in the very deed by which they parted with their direct right to the land, they remained under their original obligation to Peddie for the ground-annual by the form and condition of that deed to Borrie ; I think it follows that they could not thereafter relieve themselves of their obligation to pay the ground-annual to Peddie by the assignation to Moon of their own right to an additional ground-annual—a separate matter altogether, and not entering into the constitution of the right to the land. But as the general ground is, in my opinion, conclusive, and as the nature and terms of the arrangements made by Soot's trustees for their own separate interests cannot be founded upon by either party, and do not form part of the title to the land, it appears to me that the case is really disposed of by the view stated by Lord Wood, in explanation of the general ground on which he holds Soot's trustees entitled to judgment."

Lord Ivory.

LORD IVORY.—" I was unwilling to pronounce any definitive opinion in this case, without first having an opportunity of considering the whole terms of the different deeds out of which the question originates. Having now obtained access to these writings, and finding my first impressions thereby strengthened and confirmed, I have simply to intimate my concurrence in the opinion of Lord Wood.

" I may just be permitted to add, that the view which his Lordship has taken on the more general aspect of the question,

seems in some degree to derive additional elucidation from the terms in which the inductive clause of the original contract of ground-annual is set forth. It is in these words :—‘ Whereas the said Andrew Peddie has agreed to sell and dispo<sup>n</sup>e the subjects after described to the said James Soot, his heirs and assignees, in consideration of the latter (*i.e.*, the said James Soot, his heirs and assignees) becoming bound to pay to the said Andrew Peddie, his heirs and successors, the ground-annual, or yearly sum of £150 sterling ; and on condition, further, that the same should be declared a real burden over the said subjects, in manner after written. Therefore,’ &c. And so the deed runs on to fulfil and carry into execution, of course as between the said parties, the object and intent here briefly and in general terms enunciated. Now, it humbly appears to me, without going further, that what the parties must have had in view from the starting, was, that ‘ As James Soot, his heirs and assignees,’ were to be the dispo<sup>n</sup>ees, so (under the words *the latter*) it was the same ‘ James Soot, his heirs and assignees,’ who were to pay the ground-annual. The inductive clause of the deed certainly points at no other party ; and, as Lord Wood has, I think, successfully shown, there is nothing in the after clauses which is not perfectly reconcilable to, and explicable on, this construction. In truth, a personal obligation for a perpetuity, imposed upon parties who are to have no connexion whatever with the primary objects of the contract, and who, in progress of time, by the necessary divergency and multiplication of those possessing, directly or derivatively, the character of personal representatives of the first obligant, may eventually come to include an indefinite crowd of individuals, no one knows where to be found, is an anomaly unknown to our practice, and not readily to be assumed or entertained as an intended basis of legal liability.”

LORDS MEDWYN, MONCREIFF, CUNINGHAME, COCKBURN, MURRAY, and ROBERTSON, also concurred in the Opinion of LORD WOOD.

PEDDIE'S  
HEIRS  
r.  
SOOT'S  
TRUSTEES.  
—  
1846.

At the advising LORD PRESIDENT BOYLE observed,—“ It is the unanimous opinion of the consulted Judges that the inter-locutor should be affirmed. It will now be understood as set-

JUDGMENT.  
Feb. 27, 1846.

PEDDIE'S  
 HEIRS  
 v.  
 SOOT'S  
 TRUSTEES.  
 1846.

tled, that under deeds of this description the burden of a ground-annual follows the land. It does not continue personal upon the original disponent after he has been divested."

The other Judges concurred, and the Court "Adhered."

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II.—SMALL v. MILLAR.

Feb. 8, 1849.  
 NARRATIVE.

In 1835 a contract of ground-annual was entered into between George Miln and others, trustees of the Dundee and Union Whale Fishing Company, on the one hand, and James Small, junior, Alexander Ogilvy, and others, on the other part. By this contract, Miln and his co-trustees "sold to James Small, junior, and his heirs and assignees whomsoever," a yard with a warehouse and other erections thereon, lying on the south side of the Seagate of Dundee. These subjects were disposed under "the real burden" of a ground-annual of £273 sterling, payable yearly by Small, "his heirs, executors, and successors," to the trustees, their heirs and assignees, or other party in their right. It was declared, that if at any time two full years' ground-annual should remain unpaid, the conveyance and infeftment, or other deeds following thereon, should become null and void: and also, that it should be lawful to the said George Miln, &c., in case of failure in punctual payment of the ground-annual, "to render effectual their hypothec, or real right therefor, as accords of law, and to poid and distrain as much of the goods and effects for the time being on the subjects," for payment of the ground-annual as it fell due, and bygones thereof. The "annual payment, or ground-annual, interest thereof, and liquidate penalty, and the whole conditions and declarations" relative thereto, were "declared to be real and preferable burdens over and on the said subjects" thereby disposed. This declaration was to be engrossed in all future conveyances and investitures of the subjects under the pain of nullity. Then followed an obligation to infeft "the said James Small, junior, and his foresaids," *more burgi*; a procuratory of resignation (also under the real burden), clause of warrandice, and other usual clauses.

On the other hand, Small bound and obliged "himself, his heirs, executors, and successors whomsoever, to make payment to the said George Miln, &c., as trustees foresaid, and to the survivors or survivor of the said George Miln, &c., and to the heirs and assignees whomsoever of them, or the survivors or survivor of them, or other party in their right," of the sum of £273, in name of ground-annual, at the stipulated terms. Then followed a cautionary obligation by Alexander Ogilvy, rope and sailmaker in Dundee, and four others, by which they bound themselves, "conjunctly and severally, and their respective heirs, executors, and successors, as cautioners, sureties, and full debtors, for and with the said James Small, junior, and his heirs, executors, and successors whomsoever, to make payment" to the trustees, their heirs and assignees, or other party in their right, of the said ground-annual of £273, interest and penalty, all in manner before written, and that "aye and while the said James Small, junior, and his foresaids, shall not have erected permanent buildings on the said subjects, to the value of at least £1500 sterling." The value of the buildings was to be ascertained by the trustees in such manner as they should appoint; and, on their erection, the cautionary obligation was to become inoperative, and cease. There was also in this contract an obligation by Small, when the value of the buildings should fall below £1500, to find new security to the satisfaction of the trustees and their foresaids.

SMALL  
C.  
MILLAR.  
1849.

Small was not infeft in the subjects; but by contract, disposition, and assignation, dated 1st October 1835, in consideration of the sum of £200 paid to him by Thomas Adamson, he sold, assigned, and conveyed the subjects in question to Adamson, his heirs and assignees whomsoever. The subjects were disposed under the real burden of the ground-annual of £273; and there was assigned to Adamson the disposition by the trustees of the Whale Fishing Company above recited, with the unexecuted procuratory of resignation therein contained. This deed contained a clause of warrandice from fact and deed.

As the counter part of this conveyance, Adamson bound and obliged himself, his heirs, executors, and successors whomsoever, to pay to the Whale Fishing Company and their assignees the ground-annual above mentioned. He further bound himself



SMALL  
v.  
MILLAR.  
1849.

and his foresaids " to warrant, free, and relieve, harmless and skaithless keep, the said James Small, junior, his heirs, executors, and successors, of the whole obligations incumbent on him by the said contract entered into betwixt him and the said George Miln, &c., and ground-annual, interest, and penalties therein contained, and of all cost, damage, or expenses, that he and his foresaids may happen to sustain or incur in any manner of way connected therewith ;" and for that effect, either to make payment to the trustees or those in their right of the stipulated ground-annual ; or otherwise to pay to Small and his foresaids the sum of £273 half-yearly, as the same became due, with interest and penalty, together with all expenses which they might happen to incur in consequence of their obligation under the contract, in order that Small and his foresaids " may pay off the said ground-annual, interest, and penalties, which may be due at the time, and thereby operate their own relief."

Ogilvy and the other parties who had become cautioners for Small, in the contract with the Whale Fishing Company, further bound " themselves, conjunctly and severally, and their respective heirs, executors, and successors whomsoever, as cautioners, sureties, and full debtors for, and with the said Thomas Adamson and his foresaids, to free and relieve the said James Small, junior, of and from the payment of the foresaid ground-annual ;" and for that purpose, either to pay the ground-annual as it fell due, to the Whale Fishing Company, or those in their right, " or otherwise to make payment to the said James Small, junior, and his foresaids, of the said sum of £273 sterling of ground-annual, and that half-yearly at the terms, and with interest and penalties, all immediately before mentioned, so as the said James Small, junior, and his foresaids, may pay the same themselves, and thereby operate their own relief." The deed then provided that the obligation of the cautioners should continue until Adamson and his foresaids had erected buildings to the value of at least £1500, upon which event, their obligation should become inoperative and cease. Adamson further bound himself, when the value of the buildings should fall below the requisite sum, to find new security to the satisfaction of the Whale Fishing Company or their assignees, for the regular pay-

ment of the ground-annual, and “to free and relieve the said James Small, junior, and his foresaids, of their obligations as contained in the foresaid contract betwixt the said George Miln and others, and the said James Small, to erect and keep up buildings of the foresaid value, and that whenever called on by the said James Small, junior, and his foresaids, so to do.” On this conveyance no infeftment followed.

SMALL  
C.  
MILLAR.  
1849.

In 1836 the trustees of the Whale Fishing Company sold the ground-annual of £273 to George Millar for £6150. Their conveyance to Millar, after narrating the contract entered into between the Whale Fishing Company and Small, with the cautionary obligations therein contained, and describing the subjects conveyed to Small, proceeded—“Which subjects above described, with the pertinents, were disposed by the said James Small, junior, to Thomas Adamson, shipbuilder in Dundee, but always with and under the real burden of the foresaid ground-annual of £273 sterling, &c., conform to contract and disposition and assignation, dated 31st October, and registered in the Burgh Court Books of Dundee, 12th November 1835, both last entered into between the said James Small, junior, on the one part, and the said Thomas Adamson and the cautioners therein named on the other part.” The subject conveyed to Millar was described as “all and whole the foresaid real burden of ground-annual of £273 sterling, payable, the said ground-annual, by the said James Small, junior, to us as trustees foresaid.” The trustees farther constituted Millar, and his heirs or assignees, their cessioners and assignees, “in and to the foresaid contract and disposition, and the obligation of the said James Small, junior, and his cautioners” therein contained. This disposition contained a clause of absolute warrandice, but subject to the condition that this obligation should not infer warrandice “of the solvency and sufficiency of the said James Small, junior, and his disponees, nor of the sufficiency and adequacy of the buildings erected, or to be erected on the foresaid subjects.”

From 1836 to 1842, the ground-annual was regularly paid by Adamson to Millar, who granted receipts therefor in the following terms:—

“Received from Mr. Thomas Adamson, shipbuilder in Dun-

SMALL  
v.  
MILLAR.  
1849.

dee, £136, 10s. sterling, being one half-year's ground-annual from Martinmas 1836 to Whitsunday 1837, payable by Mr. James Small, junior, manufacturer in Dundee, to the Dundee and Union Whale Fishing Company, for the yard formerly possessed by them, and to which ground-annual I have now right, by disposition and assignation from the said Company."

(Signed) "GEORGE MILLAR."

The ground-annual due at Martinmas 1842 not having been paid by Adamson, Small was charged, at the instance of Millar, to make payment thereof. A note of suspension was immediately presented by Small, in which he PLEADED, That the original disposition of the subjects in his favour having been granted especially to him and his assignees, was in law capable of being assigned; and the right of property thereby constituted, and the burdens and obligations attached to that right being essentially concurrent and inseparable, the necessary legal effect of such assignation was to substitute the assignee in place of the cedent, in the whole rights and obligations.

Interlocutor of  
Lord Ordinary.

LORD WOOD, Ordinary, pronounced the following interlocutor:—"In respect of the disposition and assignation, of date the (30th and) 31st October 1835, granted by the suspender, disposing and making over the subjects for which the ground-annual in question was payable to Thomas Adamson, ship-builder in Dundee, who entered into possession of said subjects at the term of Martinmas thereafter, and continued to occupy the same; and in respect of the ground-annual, and the interest thereof, to which the charge under suspension applies, being the ground-annual falling due at the term of Martinmas 1842, for the half-year preceding—all prior ground-annuals having been paid by the said Thomas Adamson to the charger, as in right and place of the Dundee and Union Whale Fishing Company, the parties who conveyed to the suspender the said subjects, burdened with the said ground-annual; and farther, in respect of the decisions in the case of Soot's Trustees v. Peddie, 27th February 1846, and of no sufficient ground having been stated for making a distinction between the present case and that of Soot's Trustees, and for holding the legal doc-

SMALL  
v.  
MILLAR.  
1849.

prietorship and possession of the land, and not having any independent force by which it can subsist, apart from the parties connected with the burdened subjects. The mode of accomplishing a transference of the subject depends upon the state of the title ; and, consequently, the subsistence or termination of the personal obligation must depend upon that being done which is apt and fitting in the circumstances for accomplishing a transference.

“ Let it be assumed that, if infeftment had been taken by the suspender, the mere granting of a disposition by him, when thus vested in the feudal fee, would not be sufficient so to transfer to another the right to the subjects as to put an end to the personal obligation for payment of the ground-annual, and that possession by the disponee, consequent on the conveyance, would not have that effect if the party in right of the ground-annual refused to give up his claim upon the disponent, as still the proprietor: In that case, it may be that, by infeftment in the subjects, the disponent is so connected therewith, that, in order to relieve him from the personal obligation to pay the ground-annuals with which they are burdened, the connexion can only be broken by the real right, constituted in his person by his infeftment, being by new infeftment vested in the disponee. But even there, (that is, where the disponee continued uninfeft,) what would be the result if the holder of the ground-annual acknowledged the disponee as the proprietor, and took from him, as such, payment of the ground-annuals for a term of years, is a different question, the answer to which might be negative of the personal obligation of the disponent being still enforceable, although it might have continued to be so had the disponee not been acknowledged as proprietor.

“ But it is needless to dwell farther upon the case, where infeftment has been taken by the *original* disponee ; because, in the present instance, we have not to deal with one of that description—the suspender, the original disponee, never having been infeft. He, therefore, had only a *personal* right to the subjects out of which the ground-annual was payable. Now, where a party has only a personal right to subjects, a disposition and assignation is the proper mode of transferring the right ; and the original contract between the Whale Fishing

Company and the suspender, involving *generally* the competency of transferring it, and thereby putting an end to the disponent's personal liability for all future ground-annuals, and there having been no stipulation that, in the *special* case, while the right remained personal, a transference should not be made, the Lord Ordinary is of opinion, that the disposition and assignation executed by the suspender in favour of Adamson, followed by possession in virtue of it, was sufficient so to terminate the right of the suspender to the subjects, and to confer the proprietary right of them upon Adamson, the second disponent, as to relieve the suspender from all personal obligation for payment of ground-annuals subsequently falling due, and this although Adamson continued to hold the subjects on the personal right without taking infeftment. If he had taken infeftment, it is admitted that the personal obligation of the suspender would then have ceased for future ground-annuals. But, in the state of the title, however necessary that step might be to the absolute security of Adamson, the Lord Ordinary does not conceive that it was at all essential in principle, in order so to terminate the suspender's connexion with the subjects as to put an end to the personal obligation for the ground-annuals to which he was liable during its continuance. By the disposition and assignation, and the possession of Adamson the disponent, the same relation to, and connexion with, the lands is established in the person of the disponent, as had previously existed in the suspender, the disponent. It cannot be said, as it may be where infeftment has been taken by the disponent, that the real feudal right in the subjects continues in his person, to preserve his connexion with the lands, and prevent its being dissolved, except by infeftment, in the person of the disponent. Accordingly, it would not appear to admit of dispute, that a personal obligation for the ground-annuals attached to Adamson, as proprietor of the subjects, and not merely a liability for them as an intermitter. But if it did so, could it also subsist against the suspender? Both parties cannot be proprietors to that effect, and the personal obligation cannot exist separately and independently of any right in the obligant to the burdened subjects. If, therefore, in the state of the title, Adamson was personally bound for the ground-annuals, the personal obligation of the

SMALL  
F.  
MILLAR.  
1849.

SMALL  
T.  
MILLAR.  
1849.

suspender must have been extinguished. The right to the subjects, as a personal right, might have continued to be transmitted through a series of individuals, and for an indefinite period, each disponent in succession becoming the proprietor of the subjects, and bearing all the burdens affecting to them during his possession. According to the plea of the charger, the suspender, in respect of the personal right originally held by him, would still remain responsible for the ground-annuals. His personal obligation would still subsist, and might be enforced whenever the holder of the ground-annual found it desirable to do so.

“ It may indeed be, that the suspender, notwithstanding the disposition and assignation to Adamson, might, by fraudulently granting a second in favour of another party, have enabled that party, by procuring himself to be first infeft, to deprive Adamson of his right to the subjects. But although such a result might thus have been fraudulently produced, Adamson’s right is nevertheless perfectly good against the suspender. In a question with him, Adamson is the proprietor ; and he is also the proprietor in a question with the charger, for *he* cannot dispute the validity of the right. Nay more, it would even be good and preferable in a question with a second disponent, both parties remaining infeft ; for, till infeftment is taken by the second disponent, the rule holds, *prior tempore potior jure*. And it is not thought that the possible disappointment of the right given to Adamson in the manner referred to can be held to so qualify in his person that right as transferred to him, or keep up, in the person of the suspender, the original right which belonged to him ; that, in a question with the charger, the suspender is still to be taken to be the proprietor of the subjects, and, as such, liable in the personal obligation for the ground-annuals which, according to the nature of a right of ground-annual, only attaches to the party who, by the title, is the proprietor, and, as such, the occupant of the burdened subjects.

“ Here, on the one hand, the transference of the right to the subjects to Adamson was not latent ; and, on the other, nothing has ever been done by the suspender to interfere with it. The transference, which is dated before the term of entry, was at once made known to the Whale Fishing Company, the

authors of the suspender ; and Adamson, at the term of entry, took possession as proprietor, and continued his occupancy in that character. Accordingly, in the disposition and conveyance by the Whale Fishing Company, of date the 23d May 1836, to the charger, (by which he came to have right to the ground-annuals from the outset), the disposition and assignation by the suspender to Adamson is narrated, and the charger has all along received from him, as proprietor, the ground-annuals termly as they fell due. The Lord Ordinary's opinion is, that, even if payment had been taken under protest that it was not to infer any acknowledgment by the charger that, *quoad hoc*, the suspender had ceased to be proprietor of the subjects, and reserving the personal claim in future as against him, no personal liability for the ground-annuals could afterwards have been enforced. But nothing of the kind took place ; and it seems to be more than doubtful whether, in such circumstances, the charger, whatever claim might otherwise have been competent to him against the suspender, can now successfully maintain that he continued liable for the annual-rents, on the special ground on which it is now contended that the personal obligations against him remained in force."

SMALL  
T.  
MILLAR.  
1849.

The charger having reclaimed, the Court ordered minutes of debate on the specialties pleaded as a ground for distinguishing the present case from that of *Peddie's Heirs v. Soot's Trustees*. The Court also ordered the process to be intimated to the cautioners.

At the first advising LORD PRESIDENT BOYLE observed,—“I came to the Court this morning under a general impression, that the decision of this case must be entirely regulated by the judgment in the case of *Peddie v. Soot's Trustees* ; yet I was ready to hear any distinctions which might be drawn between the two. The judgment of the Court in *Peddie v. Soot* is, I think, very well embodied in the rubric of that case, as reported in the 8th volume of Dunlop. Now, that principle was established by us on consultation of the whole Judges. I think it a well founded decision, and am not inclined to interfere with it ; but then, my Lords, it is most material to consider, that this case

OPINIONS.

SMALL  
v.  
MILLAR.  
1849.

is so far distinguished from that of *Peddle v. Soot* by peculiarities. The first of these brought under our notice was the fact that, in *Peddle v. Soot*, not only the original donee was infeft, but the party to whom he conveyed was infeft also ; while this case is certainly different, because neither the original donee nor the party to whom he conveyed was so infeft. Here, then, is so far a distinction between the two cases, although I am not at present prepared to attach great importance to it. Where the donee is infeft, there can be no doubt as to the donor being freed from his liability ; and where there was a regular and formal disposition, such as in this case, whereby the party to whom the property was conveyed truly had right to that property, my present opinion is, that there is nothing like a solid distinction between the two cases, arising out of the fact of Adamson never having been infeft. But then, my Lords, there is another circumstance, and, as it appears to me, a most material circumstance, which appears in this case, and did not appear in the case of *Soot's Trustees*—I allude to the cautionary obligation introduced into this contract. The case of *Soot's Trustees*, no doubt, decided the general principle, that the obligation to pay followed the right to the property ; but I am not prepared to say that parties might not so contract as to bind the donee, notwithstanding such was the legal position of their rights. Now, look to the specialty in this case—(reads the clause of personal obligation). Now, here was an additional obligation ; five parties are bound as cautioners along with Small—the obligation is plainly a cautionary one—and the question is, What effect is to be given to it ? It is not an obligation to build, but that, until buildings of a certain value are erected, the obligation is to continue. We must not shut our eyes to the fact, that the superior's right would be greatly enhanced in value by such buildings being erected. He can, then, go against the subjects which are so far enhanced in value, and recover payment of his ground-annual out of them. There was nothing like this in *Soot's Trustees'* case. I must hold at present, therefore, that this is a circumstance for grave consideration ; and I am not prepared to say that it is not sufficient to create a distinction between the two cases, so as to entitle the charger in this case to enforce payment of his ground-



annual from Small. It appears to me that it is a species of contract for making an enduring obligation; and the party chose to take his right under that obligation."

SMALL  
v.  
MILLAR.  
1849.

LORD MACKENZIE.—"This is a burgage holding; and I have never understood that there was much difference of right between a burgage and an ordinary holding. I think that, in both cases, the ground-annual burden is to follow the right to the subject. I think it is impossible to hold that a man cannot sell without subjecting himself for payment of the ground-annual for ever. It would come to be an annuity for ever—a thing I never heard of. Soot's case was decided partly, no doubt, from the terms of the deeds, but partly also from the reason of the thing. The only reasonable interpretation which we can put upon such a contract, except there be specialties, is, that the obligation only continues so long as the person continues proprietor of the subjects. There is not one word from beginning to end in this contract declaring expressly that the party is to be liable for ever. In Soot's case the subject had been transferred by infestment; but in this case, although the right in Adamson had not been completed by infestment—but, on the other hand, neither was it vested by infestment in Small—I think that there is nothing in the alleged specialty of Adamson never having been infest. The principle in Soot's case applies here. The transfer was as good as the investment; both rights were equal, and Small had an undoubted right to alienate. But let us come to the other specialty. There is certainly, in the clause of obligation on the cautioners, a personal obligation, and that of a peculiar description; and I don't deny that it affords a ground for an argument—which argument would be, that the party had not the right of alienation until the houses were built; but I don't see any evidence of it. The cautioners are bound for Small and his successors; but I do not see how this merely subsidiary effect can act as a limitation of the rule now established. With regard to the cautioners, I cannot understand that they have a shadow of a pretence for escaping from their obligation. But I cannot see how this affects the liability of Small."

LORD FULLERTON.—"I think the case of Soot quite conclusive as to the general principle, that the personal obligation is only

SMALL  
v.  
MILLAR.  
1849.

an accessory to the real right. But I do not think that the principle of that decision is at all touched by the fact of there being no infestment in Adamson. It is so far against the pleas for Millar that he made no application to Small till this charge was given. No doubt the receipts bear that the ground-annual was payable by Small; but Small was no party to these receipts, and could not be affected by anything they contained.

“But with regard to the other specialty of the cautionary obligation, I cannot but regard it as of vital importance; and I must say, that I agree with Mr. Anderson’s views of the case. An obligation may certainly be so expressed as to take it out of the general rule; and I think that, in this case, all parties had contemplated that the ground was not of sufficient value to bear the burden of the ground-annual until buildings of the value of £1500 were erected; and when they took Small bound along with cautioners until these buildings were erected, I cannot but hold that this thereby constituted a personal obligation, enforceable until the buildings were erected. The words used are the words of a personal obligation; and I think it is clear, from the whole tenor of the deeds, that it was the intention of parties that Small should continue bound as by a personal obligation—a good personal obligation upon Small until the houses were built, when this, and also the cautionary obligation, would fall. The disposition by Small to Adamson contains an obligation on Adamson and his cautioners to relieve Small; but if Small be freed by the operation of the law, he would continue liable no longer; and the fact of the contract, this obligation, seems sufficient to imply, that it was the intention of parties that Small should remain bound.”

LORD JEFFREY.—“I think all your Lordships are agreed in this, that the fact of Adamson never having been infest does not create any distinction between the two cases; and with these views I concur: I think, too, that we ought to pronounce judgment at present upon that point. But I must confess that I have doubts on the other specialty raised; and, where your Lordships are divided in opinion, it is our duty to have further investigation. I think that the principle of Soot’s Trustees undoubtedly applies here. We must hold that it is not an obligation entailed upon all who had been proprietors of the property

for ever, but that the property is transferable at will ; and with the transfer of the property the obligation ceases, otherwise we have the anomaly, that all parties who may become proprietors of this property, and their respective successors during all time to come, continue liable for the ground-annual. Adamson becomes bound here by becoming proprietor ; but do he and his heirs become bound in all time coming ?

SMALL  
F.  
MILLAR.  
1849.

“ Consider the transaction by which Small conveys to Adamson *unico contextu* with the conveyance acquired by himself from the Whale Fishing Company, and I think, from the very nature of that transaction, that the cautioners understood that they were to be bound along with Small and his singular successors in the property. For they, in the conveyance to Adamson, bind themselves anew, along with him. Again, I think it is an important circumstance, that not only does the conveyance by the Whale Company to Millar recite the conveyance by Small to Adamson, but it expressly excepts from its warrantice the solvency of these parties. The cautioners, then, were plainly interposed for the security of the Whale Company ; and I must just hold that they became bound for Small, *and his disponees*, in perpetuity.”

PLEADED FOR THE CHARGER.—The suspender did not mean to advance any argument against the principle laid down in *Peddie v. Soot's Trustees*, but there are in the present case specialties which render the decision in that case inapplicable. In the first place, in the case of *Peddie*, the personal obligation to pay the ground-annual was not fortified by a cautionary obligation, consequently there was not on the face of the contract the evidence which existed here of its being an essential element in the agreement of parties, that, in supplement of the real security, and until it should be made of the specified value, there should be held in addition by the creditor in the ground-annual, the personal obligation of the disponee and his cautioners. Although the principle has been decided, that the burden of a ground-annual follows the land, and does not continue personal upon the original disponee after he has been divested, that personal obligation might subsist notwithstanding the divestiture, were such the intention of the contracting parties.

ARGUMENT FOR  
CHARGER.

SMALL  
v.  
MILLAR.  
1849.

By the present contract such an obligation was contemplated, distinct from any connexion by the obligants therein with the land burdened. Such an obligation was undertaken by the cautioners, who had nothing to do with the real right, and their interposition was merely corroborative of the personal obligation undertaken by the suspender and his representatives.

It could not be said, that whenever the suspender got rid of the obligation by divesting himself of the real right, and introducing a new debtor into the obligation, the cautioners were freed from their liability. This was inconsistent with the purpose of the obligation, which was to afford the creditor in the ground-annual ample security until buildings were erected sufficient to afford that security. Nor could it be said that the cautionary obligation would subsist and be as effectual to the creditor as if there had been no change in the principal debtor. The cautioners were bound for and with the principal debtor. Their obligation could not be absolute while his was contingent. If the charger had gone against the cautioners, was not the suspender liable to them in relief? The plain construction of the contract was, that till the buildings on the ground disposed afforded sufficient real security for payment of the ground-annual, the disponent and his cautioners were to continue personally liable, notwithstanding the divestiture of the disponent.

There was a farther difference between Peddie's case and the present. In the former, both the original purchaser and his disponent were infeft—in the present case neither is infeft. No real burden was ever constituted—the land was not affected with the ground-annual, really and feudally—and, till that was done, the personal obligation continued to have an independent existence, capable of being enforced against the obligants. The contract of ground-annual is in most respects similar to the contract of feu. In the latter case, beyond question, a personal obligation co-ordinate and not alternative with the real right, arises against the vassal *ex contractu*, and may be enforced by personal action against him. This personal obligation continues against the original feuar until a disponent from him has entered as vassal, and has become, by legal substitution, personal obligant for the feu-duty exigible under the contract. That principle applies with even greater force to a contract like the

present, which contains an express personal obligation. Undoubtedly a personal obligation subsists either against the original obligant or his disponent. In this case it must subsist against the original obligant, because the disponent never connected himself with the lands. Small never was divested, Adamson never became his "successor in the lands," and the permanent personal obligation cannot touch him in that character, whatever may be his temporary liability as intromitter with the fruits.

SMALL  
v.  
MILLAR.  
1849.

PLEADED FOR THE SUSPENDER.—The present case is entirely parallel to that of *Peddie v. Soot's Trustees*, and there is nothing in the specialties relied on by the charger as distinguishing it from that case. First, the cautionary obligation is accessory to, and must be construed conformably with, the primary obligation, which attached to "the said James Small, his heirs, assignees, or successors whomsoever." Such an accessory obligation expressed in a clause distinct from that which contains the primary obligation, and which imposes no new obligation on the primary obligant, can have no effect on the construction of the primary obligation to which it relates. At all events, as the primary personal obligation depends, as was held in *Peddie v. Soot's Trustees*, on the possession of the subjects, it cannot fasten a personal liability on the original disponent, notwithstanding the transmission of the subject. In the present case this construction was necessitated by the specialty that the cautionary obligation was limited and determinable by acts which could be performed only by the proprietor for the time being, to whose primary obligation it necessarily passed as accessory.

ARGUMENT FOR  
SUSPENDER.

Nor is there anything in the specialty that neither the suspender nor his disponent have been infeft. The personal obligation, where it is not expressed in the contract, is merely accessory to the real burden on the lands, and depends upon the civil or actual possession, or intromission with the fruits of the subject burdened. The express personal obligation in this contract does not bind any persons, other than those who under the conveyance might enter into possession, *i.e.*, the suspender, or his successors; and the suspender never having entered into

SMALL  
v.  
MILLAR.  
1849.

possession, actual or civil, but having transferred his right to a successor, who did enter into actual possession, that successor became liable in the personal obligation. Had the suspender taken infeftment, he might have been liable so long as his disponent continued uninfeft, because, while his infeftment lasted, he held, in the eye of the law, civil possession of the subject ; but as he never had civil possession by infeftment, nor actual possession by occupancy, he never incurred the personal obligation dependent on possession.

JUDGMENT.  
Feb. 3, 1849.

On advising the Minutes of Debate, the Court “ Adhered to the interlocutor of the Lord Ordinary.”

OPINIONS.

LORD PRESIDENT BOYLE observed,—“ When this cause was formerly before us, I found no difficulty as to the second specialty relied on by the charger, as distinguishing it from *Peddie v. Soot's Trustees* ; it did not appear to me at all material that neither the suspender nor his disponent were infeft. I was decidedly of opinion that the case of *Peddie* should not be departed from, but I wished to hear further argument upon the other specialty. There was not in the feu-contract in that case any clause by which third parties bound themselves as cautioners for the regular payment of the ground-annual, until buildings of a specified value were erected on the subject disponent. It was on that point we wished for further argument. I may say that my mind is now in some measure relieved from the difficulties I felt ; but I should still like to hear some further statement as to what this clause meant. Does it mean that the cautioners were to be bound only as long as Small was bound ? I do not think this was their intention ; and on the whole I am for adhering to the interlocutor of the Lord Ordinary.”

LORD MACKENZIE.—“ I hold that the case of *Peddie* must rule this. I do not think there is any mystery about the cautionary obligation. This is not exactly a feu, but it is just the same in substance. There is the obvious risk, when a man takes a feu, that he may not build, and so the superior has no real security for his ground-annual. In that case it is necessary that he should have some security that houses shall be



built on the feu. That security may be obtained in various ways. A third party may become cautioner that houses will be built, or, as here, that he will see the ground-annual paid till they are built. This obligation is merely accessory to the obligation to build, and is not limited to the original disponent, who may disponent again next day. The obligation is upon the feuar and his successors. I see no reason to doubt this law, but a doubt was stated, and the cautioners accordingly renewed their obligation for the next disponent. That shows that they merely doubted the law, and did not mean to put an end to the obligation they had already undertaken. There was nothing illegal in their being cautioners, not only for the original disponent, but for his successors, till buildings of sufficient value were erected. They bound themselves for the original disponent, his heirs and successors; that expression obviously includes singular successors, and is not limited to the original disponent and his representatives. There is thus no argument from the cautionary obligation, that the original disponent is to continue liable for ever. The ground-annual is payable in respect of the property of the ground, and the original disponent's liability ceases on his denuding himself of that property. If it were not so, any subject thus acquired would be inalienable; it would be a sort of entail; for what good would it do a man to alienate, if he were to continue liable for the burdens affecting the property? I do not think there is any speciality in this case to take it out of the general rule."

LORD FULLERTON.—"My opinion is now the same. We have no question here with the cautioners. The only question is, Whether the existence of the cautionary obligation interferes with the general principle of law announced in the case of *Peddie*?"

LORD JEFFREY.—"I concur. The only difficulty arises from the want of decisive information in our institutional writers, as to the nature of ground-annuals. However, we are all agreed that the judgment in *Peddie's* case was sound; and holding it to be so, I should be very sorry to see the principle there laid down impaired, because of minor specialties in the present case. We are at one in holding that the specialty of the right to this subject having continued merely personal, makes no

SMALL,  
F.  
MILLAR.  
1849.

SMALL  
v.  
MILLAR.  
1849.

distinction between the cases. The other specialty was the cautionary obligation. That obligation was undertaken not only for Small, but also for his successors; and I see nothing in the contract to limit it to Small alone. I therefore think this case must be ruled by Peddie's; there is nothing to distinguish them."

1. Skene in his Treatise De Verborum Significatione observes,—"ANNUELL, ane word used in the practik of this realm, for ane zeirlye revenue or dewty payed at certaine termes ather legal, quhilks are called *termini legales vel legitimi* prescribed and appoynted be the law of this realm, sik as Martinmes and Whitsonday, or conventional, as pleasis the parties till agree and appoynt be paction and contract, as between Zule and Candlemes, or ony uther time. In the Actes of Parliament maid be Queen Marie, 4 Parlia. 29 Maij, c. 10, mention is maid of ground-annuell, few-annuell, and top-annuell, quhairof I have red nathing in ony uther place, and am uncertaine quhat they do signifie, bot referris the samin to the judgement and opinion of the reader. Alwaies, ground-annuell is esteemed to be quhen the ground and propertie of onie lande, bigged or unbigged, is disposed and annalied for ane annuell to be payed to the annalier thereof, or to ane uther person, sik as ony Chaplaine or Priest. Top-annuell is ane certaine dewtie given and disposed furth of ony bigged

tenement, or land, of the quhilk tenement the propertie remainis with the disponer, and he is only oblised to paye the said annuell. Feu-annuell is ather when the few-maill or dewtie is disposed as ane zeirlye annuell; or quhen the land, or tenement, is sette in few-ferme heretablie, for ane certaine annuel to be payed *nomine feudi firmæ*."—*Skene de Verborum Significatione*.—*Voce Annuell*.

2. Lord Stair in treating of annualrents observes:—"The English distinguish rent in rent-service, rent-charge, and rent-seck. Rent-service is that which is due by the reddendo of an infeftment of property, as a feu or blench-duty; this is as a part of the infeftment of property, but hath the same effect by poinding of the ground, as other annualrents. Rent-charge is that, which not being by reddendo, yet is so constituted, that the annualrenter may, *brevi manu*, (his term being passed,) poind the ground therefor. We have no such annualrent, for we admit of no distress without public authority; but all execution must proceed by decret and precept. Rent-seck is so called,



as *redditus siccus*, because it is dry, having no effect without sentence,—such are our annualrents. There is a distinction of annualrents mentioned, Parl. 1551, c. 10, in feu-annuals, ground-annuals, and top-annuals, which Craig thinketh to quadrate with the English distinction of rents, but the consideration of that Act and ordinance in relation to the articles there expressed, will make it appear, that the case being there of tenements within burgh, the feu-annual is that which is due by the reddendo of the property of the ground before the house was built; ground-annual is a distinct several annualrent constituted upon the ground before the house was built; and the top-annualrent is out of the house. The chief effect of annualrents, either by reddendo in property, or several infeftments, is by pointing of the ground, upon which the annualrent is constituted, and that by an ordinary action, whereby the annualrenter pursueth for letters to point and apprise all goods upon the ground for payment of his annualrent, and also for the pointing and apprising the ground-right and property itself.”—*Stair*, ii., v. 6, 8.

3. Mr. Ross in his Lectures observes,—“Skene’s definition is right and applicable. The feu-annual is the direct rent or service by charter. The ground-annual is the rent-seck by reservation, and the top-annual is the

rent-charge by deed. By degrees the real distinction was lost in our general practice respecting *debita fundi*. They all grew into rent-services leviabie by pointing the ground, and retained only the names of what they had been. It is plain that both the English and we have had all our divisions of rents from the French. Rent-seigneuriel is, with them, the duties and services due to the chief lord or superior. Rent-foncier is the rent due to the proprietor. ‘There are two ways (say the French lawyers) to create a real rent; one, when the proprietor alienates his land, reserving a rent to himself; the other, when he directly charges the land with a rent.’ This is exactly the rent by reservation, and the rent-charge by deed. When a second rent is imposed upon land by the vassal-superior to what he himself pays, it is termed rent-arrier-foncier, answering precisely to our subaltern or excresce feu-duties.”—*Ross’s Lectures*, vol. ii. pp. 327, 328.

4. Arrears of ground-annuals do not bear interest unless that is expressly stipulated for in the deed reserving the ground-annual. This rule was found applicable to arrears of feu-duties in the case of *Napier v. Spier’s Trustees*, May 31, 1831. The same principle was extended to ground-annuals in the case of *Moncrieff v. Lord Dundas*, Nov. 24, 1835.

## PERSONAL AND REAL.

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*An onerous Assignee to an Heritable Bond of Annualrent not feudalised, who takes infeftment on the unexecuted precept in the bond, is not affected by the back-bond of his cedent.*

FERGUSSON v. M'CUBBIN.

July 20, 1716. **NARRATIVE.** JOHN ADAM granted an heritable bond over his lands of Glentig for the sum of 16,000 merks to David M'Cubbin. M'Cubbin, without having executed the precept of infeftment contained in the bond, assigned the bond *ex facie* absolutely, but truly in trust, to William Baird, who of the same date with the assignation, granted a back-bond declaring the trust. The purpose of this conveyance by M'Cubbin was to enable Baird to lead an adjudication against Adam on account of M'Cubbin's debt as well as Baird's own. An adjudication was accordingly led by Baird, and he thereafter assigned the adjudication and also the bond to Margaret Fergusson, in security of a sum advanced by her to him. Margaret Fergusson took infeftment on the unexecuted precept on M'Cubbin's bond, and also obtained decree of poinding the ground. A multiplepoinding was afterwards raised by the tenant in the lands, in which Margaret Fergusson and the daughter of M'Cubbin compeared.

**ARGUMENT FOR FERGUSSON.** PLEADED FOR FERGUSSON.—The bond in question being an heritable right completed by infeftment in the person of Mar-

garet Fergusson, it is not affectable by any back-bond of her cedent. The back-bond is only an obligation upon the granter. It neither denudes him nor lays any real burden upon the heritable bond. The back-bond, therefore, cannot affect a singular successor *bona fide* acquiring for an onerous cause from the granter of the back-bond. There is a solid difference in law between an assignation to debts on personal obligations and an assignation to a precept of sasine. Assignations to bonds or other rights merely personal in the person of an assignee, are affected by back-bonds, because the *jus crediti*, or right itself, remains in the person of the cedent, nothing being transferred to the assignee but a procuratory *in rem suam*. On the assignee granting a back-bond, the assignation becomes a simple revocable mandate, or a power of exaction. As the cedent, therefore, is not denuded of the right in favour of the assignee, the assignee cannot transfer the right to a singular successor.

Where a precept of sasine is assigned, the case is quite otherwise. The cedent is denuded by the assignation even without intimation. Although, therefore, the assignee grant a back-bond to the cedent, yet the right being constitute in the assignee's person, if he assign the precept, he transmits the right to a singular successor. But an assignee to a personal bond cannot transmit the right to a singular successor, because it was not transmitted to himself, but remained in the person of his cedent.

The argument drawn from apprisings does not hold in the case of voluntary rights by infestment of annualrent. It is true that back-bonds granted by an appriser affect singular successors ; but the difference between singular successors in apprisings and singular successors in rights of annualrent is evident. Where a personal bond is assigned in order to have an apprising led, and the assignee who is to lead the adjudication in his own name grants a back-bond, the case is the same as that just stated of assignations to personal bonds. Intromission, too, within the legal, extinguishes an apprising, but it will not extinguish a right of annualrent. A decree of apprising adjudges the lands and rents in satisfaction of the debt, both the principal and annualrent. But an heritable right of annualrent is not disposed in satisfaction of the principal sum, but only of the annualrents.

FERGUSSON  
v.  
McCUBBIN.  
1715.

FERGUSSON  
v.  
M'CUBBIN.  
1715.

An annualrenter has warrant to poind for the annualrent only. An annualrent, therefore, not being granted in satisfaction of the principal sum, an annualrenter's intromission over and above the principal sum can never extinguish the principal sum. It can only be the ground of a claim against the annualrenter upon the plea of compensation, which, not being liquidated before the singular successor's right, cannot affect his right.

But even although intromissions of an annualrenter did extinguish the right of annualrent to a singular successor, it does not follow that a back-bond affects a singular successor. Intromission extinguishes *ipso jure*, but a back-bond is only the ground of a personal action. It does not denude the granter, nor does it lay any burden upon the right, so as to impede its transmission. A singular successor, therefore, in whose favour the granter of the back-bond is habilely denuded, is under no obligation to regard the back-bond.

But even although a back-bond was admitted to affect an assignee to a precept of sasine so long as it remains personal, yet as soon as the assignee's right is completed by infeftment, no personal obligation, upon which infeftment has not followed, can burden the complete right. Nor is it at all strange that that which is effectual against an incomplete real right should cease to be so so soon as the right is completed by infeftment. This is evident when the design of the Registers is considered ; for if anything could affect a real right which does not appear upon record, the Register would signify nothing.

ARGUMENT FOR  
M'CUBBIN.

PLEADED FOR M'CUBBIN.—No infeftment was taken upon the heritable bond either in the person of M'Cubbin or of Baird, his assignee and trustee. So long as an heritable right stands in the terms of a personal obligation, it is affectable by a back-bond in the same manner as a personal bond. The back-bond in question being granted by Baird while his right stood in the terms of a personal obligation, the said obligation must transmit to Margaret Fergusson with the burden of the back-bond. A back-bond granted by an assignee to an apprising is effectual against singular successors in the apprising, even though infeft therein, at any time within the legal. After the legal is expired, a latent back-bond, it is true, cannot affect a singular

successor, because an infestment upon an expired legal becomes an absolute and irredeemable right of property. But all redeemable rights, and rights in security, may be qualified by the deeds of the original creditor, or any one having right for the time ; and their discharges and back-bonds will affect singular successors.

FERGUSSON  
v.  
M'CUBBIN.  
1715.

There is no imaginable difference between an apprising within the legal and an infestment of annualrent. The one is a *PIGNUS PRÆTORIUM*, and the other a *PIGNUS CONVENTIONALE* ; and they are both extinguishable by the intromissions of authors. Whatever extinguishes or qualifies a debt itself must also affect the rights and securities of the debt. *SUBLATO PRINCIPALI, TOLLITUR ACCESSORUM*. *Pignora* and *hypotheca* become void by payment of the debt. An annualrent, therefore, cannot subsist if the principal sum to which it relates be extinguished. Neither can it subsist in the person of any one other than the party to whom the principal sum belongs by back-bond or otherwise. A back-bond of trust granted by an assignee affects and extinguishes his right with respect to the cedent, in whose favour it is granted, as much as a discharge extinguishes a debt with respect to the debtor.

Personal rights, or rights in security of a principal sum, must follow the faith of their authors. *QUISQUE SCIRE DEBET CUM QUO CONTRAHIT* and *QUISQUE UTITUR JURE AUCTORIS*. Miss Fergusson acquired right to a bond of annualrent, upon which no infestment had followed. She cannot pretend, therefore, that she was ensnared by a latent back-bond, seeing that the law has provided no remedy for the purchaser of such rights. The only rule is *CAVEAT EMPTOR*. Infestment upon a disposition of lands is in quite a different position from an infestment upon a right in security. In a disposition of lands, the land is the debtor, the procuratory or precept being only a mandate to give possession. But in an heritable bond the original creditor always retains the *jus obligationis* ; and a back-bond granted by an assignee is *pars contractus*, and affects the assignation or procuratory, so as to make the assignee in truth a procurator for behoof, not of himself, but of his cedent. A singular successor, therefore, can never be secure against his author's back-bond qualifying his right.

FERGUSSON  
 v.  
 McCUBBIN.  
 1715.  
 JUDGMENT.  
 July 20, 1715.

The Lords Found "That the back-bond granted by William Baird to Knockdolian was not effectual in prejudice of the said Margaret Fergusson her infestment, she being a *bona fide* purchaser for an equivalent onerous cause ; and therefore preferred the said Margaret Fergusson."

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1. The earliest case on record relative to a completed heritable right qualified by a back-bond is that of *SHAW v. KINROSS*, March 10, 1629. In that case a party infest in an annualrent conveyed it to another. The disponent, before he was infest, gave a bond to his author, reponing him in the liferent of the annualrent. He then took infestment on the conveyance in his favour, and thereafter conveyed the right of annualrent to the debtor in it, who was, however, taken bound to pay the annualrent to the first annualrenter, conform to the back-bond in his favour. The lands were afterwards adjudged from the debtor in the annualrent, and the question arose,—Whether the land was affected with the burden of the annualrent, and the adjudger bound to pay in conformity with the back-bond, held by the first annualrenter ? The Court held that the adjudger might bruik the land without burden, which he, a singular successor, was not bound to pay, although his debtor, from whom he adjudged the lands, and his heirs, might be personally bound to do so. The reason of the judgment is stated to be, that the real

right being conveyed to the proprietor of the lands burdened, no bond given by the disponent, or acknowledgment thereof by the disponent, could affect the land against a singular successor ; and that therefore the first annualrenter who had continued in possession in virtue of the back-bond had no right against the land, or against the singular successor in the land, but only against the heirs of the maker of the bond.

2. In the case of *LIVINGSTON v. CREDITORS OF GRANGE*, November 23, 1664, Lord Forrester died infest in the lands of Grange. A creditor of his sought to adjudge these lands, when a creditor of the Laird of Grange compeared and produced a back-bond granted by Lord Forrester to the Laird of Grange, bearing that his infestment was in trust for the use and behoof of the Laird of Grange, and only for Lord Forrester's behoof in relief of such debts as he should be engaged in for Grange. Grange's creditor therefore PLEADED,—That he being Grange's creditor, and now insisting in an adjudication of the lands of Grange for Grange's own debt, he had good interest to object to this ad-

judication of Grange's estate, except in so far as it might be extended to Lord Forrester's relief. LORD STAIR reports the judgment of the Court as follows :—"The Lords having considered the case amongst themselves, how dangerous it were if, the creditors or persons intrusted obtaining infestment of an intrusted estate, the back-bond of trust, being personal, would not exclude them, and, albeit the person intrusted were not *solvendo*, as in this case, the intrusted estate, as to the heirs and creditors, would be unavoidably lost. Some were of opinion, that a personal exception upon a back-bond could not be competent to burden, or qualify a real right, or an action for obtaining thereof. But the most part were of opinion, that albeit the right, if it were complete, would be real; yet this action for obtaining thereof is but personal, for real actions are such only which proceed upon real rights, and against the ground, such as upon annualrents; and therefore this being a personal action, might be excluded or qualified by a personal exception upon the back-bond. And therefore they adjudged, with the burden of the back-bond."—*Stair's Decisions*, vol. i. p. 232.

3. The judgment in the case of *LIVINGSTON v. GRANGE'S CREDITORS* appears at first to run counter with the principle applied in the previous case of *SHAW v. KINROSS*. But it does not really do so. Had the creditor of Lord Forrester been infest on an heritable bond, or had he succeeded in

obtaining an adjudication of the lands of Grange without Grange's creditors compearing and opposing it, his right would not have been qualified by the back-bond granted by his debtor. But the creditor of Grange having compeared *in cursu diligentiae* and opposed the adjudication, the Court held that the right of Lord Forrester's adjudging creditors should be qualified by it.

4. In the case of *WORKMAN v. CRAWFURD*, November 20, 1672, the Court held that a singular successor infest was not affected by a back-bond of trust granted by his author, unless it could be proved that his right was without an onerous cause, or that he knew of his author's back-bond when he received the right, and so became partaker of the fraud.

5. In the case of *ANDERSON v. SIR JOHN DEMPSTER and DUDGEON*, November 14, 1704, Anderson, a burghess of the burgh of Inverkeithing, conveyed, in 1681, a tenement within the burgh to Sir John Dempster, for the purpose of capacitating him for being elected commissioner for representing the burgh in Parliament. Anderson continued in possession till his death. Sir John Dempster thereafter sold the tenement to Anderson's widow and her second husband for £1000 Scots. Upon this Anderson's heir brought an action of reduction and declarator, on the ground that the tenement was given to Sir John in trust, for the sole purpose of enabling him to be elected Member of Parliament for the burgh. Sir

John having been examined, the pursuer's averments were established by his oath; and he PLEADED, that the conveyance by Sir John to Dudgeon must consequently fall.

6. LORD FOUNTAINHALL gives the judgment of the Court as follows:—"The Lords found, that Dudgeon having acquired it by an onerous title, equivalent to the value of the house, the trust in Sir John's person could not affect his right, it not being a *ritium reale*, and that Sir John his cedent and author's oath could not prejudice him, unless it could be qualified that Dudgeon was *consciens fraudis*, or knew of the trust; but they inclined to think Sir John would be liable, both in respect of his own acknowledgment that the disposition was given him on the account foresaid, and that *nemo præsumitur donare vel suum perdere*; and the *natura negotii* seemed plain that a gift was not here designed, especially being *retenta possessione* by the disponent all his lifetime; but the summons being rather a reduction of Dudgeon's right than a declarator of trust, they assoilzied Dudgeon from the reduction, but allowed Sir John to be farther heard as to any personal conclusion of trust or damages against him for contravening the said trust."—*Fountainhall's Decisions*, vol. ii. p. 160.

7. An exception to the rule now illustrated was at one time made in the case of assigned apprisings or adjudications, where back-bonds had been granted before infestment had followed on the adjudication and before the

expiry of the legal. No exception it is thought would be made now. The exception arose from the peculiar nature of adjudications, and the reason is given at length by LORD GOSFORD in his report of the case of KENNEDY v. CUNNINGHAM and WALLACE, July 12, 1670. In that case a back-bond of trust granted by an adjudger, was found to qualify the adjudication in the person of a singular successor infest on the adjudication. LORD GOSFORD observes,—"The Lords having considered this case as being of a general concernment, sustained the pursuit founded upon the back-bond, and the cautioner's intromission, upon these reasons; 1mo, That there was nothing more ordinary, than that many creditors were in use to lead a comprising in the name of a person upon back-bonds, or a declaration of trust, which did secure them against all deeds done thereafter by the person entrusted, in respect of the nature of a comprising, which might be extinguished by a discharge or intromission; so that if this ground were taken away, then there would be a necessity, that every creditor, albeit for a small and inconsiderable sum, should comprise in his own name, and be infest, otherwise the person entrusted might prejudice him of his debt, or should be forced to cause him resign and infest him, lest he should dispoise to another, or, by serving inhibition and raising of a reduction, should secure his interest; which would hinder all persons to accept of a trust. 2do, By our law and



practice, comprisings are found to be such rights, that albeit infestment follow, yet they may be extinguished by a discharge of the sums for which comprising is led, and in that they are different from rights of wadset, annualrents, or infestments; for these are securities that cannot be taken away by personal rights, but by renunciations and resignations, whereupon infestment follows. The reason of which difference is, that comprisings are but legal diligences, and infestments taken thereupon are consequential to a decret given by a messenger decerning lands, albeit of never so great value, to belong to a creditor for a small inconsiderable sum, which being truly satisfied or discharged, is in law most unfavourable, and so may be extinguished in a singular manner; whereas infestments upon wadsets and other real securities, are founded upon contracts and dispositions subscribed by the parties themselves, bearing procuratories and precepts to denude the granter *omni habili modo*, and to seek the real right in the person of the creditor, and therefore cannot be divested but in that same manner that the law allows. But if the case had been where a compriser having comprised for his own proper debt, and were infest, and granted only a personal right by assignation, or a bond to denude, whereupon nothing followed, if, thereafter, a singular successor had acquired a real right, or had intimated a second assignation before the first assignee, in that case, posterior rights would

be preferred, as being first complete; and the reason is, because, where a person's name is only entrusted, and gives a back-bond, and during the trust suffers the true creditor to possess until the debt be satisfied, in that case, the law doth extinguish, and makes as if it were transferred in the person of the creditor, who did make use of his name, if the back-bond or declaration of trust was before his infestment, it being then only a personal right; but if the back-bond or declaration be only granted after infestment, the question would be more difficult where a third party acquires a valid right; and yet it seems that the decision will be alike in both cases, if it be made truly to appear, that the compriser's name was only borrowed from the beginning, and that he did declare so much under his hand before any right made to a third person, in respect that a right of comprising is singular of its own nature, and different from other real securities, as said is; and that, in our law and practice, it was never otherways found; whereas, if it were otherways, it would open a door to many indirect contrivances, and occasion vast charges and expenses for payment of a yearly duty by every petty compriser to the superior." —*Gosford, MS. M. 10208.*

8. A similar judgment was pronounced in the case of *BROWN v. GAIRNS*, Nov. 21, 1673, where the successful plea was, that a comprising of lands was of a different nature from an heritable and irredeemable disposition where-

upon infestment followed, and by the law and constant practice, might be extinguished by intromission, or a naked discharge of the whole or any part of the principal sum *pro tanto*; and therefore, by a back-bond, declaring the trust which was granted before any infestment or comprising led. LORD GOSFORD again gives the reason of the judgment, and observes,—“The Lords Found, That a comprising within the legal was such a right as might be extinguished by private deeds, such as discharges or intromissions, with as much of the maills and duties as would amount to the sum contained in the comprising, and thereupon a back-bond granted by the comprisinger, bearing a trust, before leading of the comprising or any infestment, was sufficient to denude or qualify his right against a singular successor, as hath been found by the constant practice, when a private discharge was alleged upon; especially considering, that if it were otherways, there would be an absolute necessity that every creditor, albeit for never so small a sum, behoved to lead a several comprising, to the ruin of the common debtor, and would open a door to those whose names were entrusted, to defraud all other creditors, against their own back-bonds and declarations, which hath always been looked upon as a perfect security; and it was so decided *in terminis*, the 12th of July 1670, Kennedy against Cunningham.”—*Gosford*, MS. M. 10209.

9. In reference to the effect of

back-bonds as qualifying rights conveyed to singular successors, LORD STAIR observes,—“Assignations to incomplete real rights, as apprisings, dispositions of lands before infestment, are affected with the cedent's back-bond, if the competitor come in before infestment, or if inhibition be used, a legal diligence that makes the matter litigious; and therefore the back-bond of an assignee to an apprising was found effectual against his successor by translation, July 6, 1676, GORDON. But an infestment of annualrent granted by one having a disposition of lands, not drawn in question till dispositive's singular successor was infest upon his assignation, was not found effectual against that singular successor, June 20, 1676, BROWN. For if assignations, back-bonds, or even discharges, or renunciations (unregistered) of redeemable dispositions of lands, were effectual against singular successors in these lands after these rights were perfected in their own persons, or their authors by infestment, it might in a great part disappoint the design of these excellent statutes for registration of land-rights. Therefore unless inhibition were used, or the matter made litigious upon these personal rights before infestment, they are not liable to affect a real right, or a singular successor therein. But because apprisings within the legal may be taken away in the same way as personal rights, therefore assignations, discharges, and back-bonds, by those who have right to the ap-

prising, being made within the legal, are effectual, and if thereupon the matter be made litigious before the expiring of the legal reversion, or inhibition being used thereupon, they will be effectual against the singular successors even after the legal has been expired. But after expiring of the legal, infeftments upon apprisings are in the same case as infeftments upon irredeemable dispositions, for they are the foundation of the rights of most lands in the kingdom; and if personal rights should make them insecure after the expiry of the legal, it would be of great inconvenience."—*Stair*, III. i. 21.

10. The case of *FERGUSSON v. M'CUBBIN* was before the Court in deciding the case of *BELL v. GARTSHORE*, July 15, 1737. See *volume II.*, p. 410. Upon a leaf appended to the Session Papers in that case, preserved by LORD KILKERRAN, the following Note is written:—"The case between M'Cubbin of Knockdolian and Margaret Fergusson, determined in summer 1715, upon report of the Lord Dun, was this,—M'Cubbin had an heritable bond upon Glentig, which, without being infeft upon it he disposes to Baird, which disposition Baird by a back-bond acknowledged to be a trust, in order to adjudge. Margaret, upon the faith of Baird being possessed of this heritable bond, lends him a sum of money, and takes right to the heritable bond in farther security thereof, and thereafter infefts herself upon Glentig's precept. In a competition which ensued for the maills and duties,

though the right was personal at the time of her purchase, yet being infeft before the back-bond appeared, the Lords preferred her to the representatives of M'Cubbin, who pled preference upon another back-bond. In this case the argument against the decision was, That as the right was personal when the back-bond was granted, it then did affect it, and remained to do so even at the date of Margaret Fergusson's purchase, when still it was personal. To which it was answered, That any one purchasing a precept or procuratory, and infefting before anything appear that may affect it, stands secure upon the footing of the register, upon the faith whereof he is no less a purchaser than if he had first infeft his author, then himself, which is daily sustained, though actually he had made the purchase before he infeft his author."—*MS. Notes, Kilkerran's Session Papers.*

11. In a MS. Note of LORD ELCHIES on the Session Papers, in the case of *FERGUSSON v. M'CUBBIN*, it appears that the Court drew the distinction afterwards for long so strenuously contended for between an adjudger and a purchaser. He writes,—“The Lords advising distinguished betwixt an infeftment on a voluntary precept and on legal diligence, and found that in the former a back-bond could not affect a singular successor purchasing *bona fide* for adequate onerous causes.”—*MS. Notes, Elchies' Session Papers.* This distinction is now exploded. See *infra*.

*An Adjudger, on account of a personal debt, or a Trustee for Creditors, is equally unaffected by the Debtor's personal obligations as an heritable creditor or an onerous purchaser is ; and the doctrine of taking tantum et tale, in so far as relates to personal obligations affecting the debtor, has no place in the case of Feudal Rights.*

I.—MITCHELL v. FERGUSSON.

**Feb. 18, 1781.** WILLIAM DONALD sold a house in the town of Ayr to Agnes Carson. The price was paid by William Fergusson on Agnes Carson agreeing to grant him an heritable bond or disposition of the subjects for his security. Agnes Carson having failed to grant this security, Fergusson brought an action against her, concluding that she should be ordained to do so. In this process he obtained a decree in absence, dated July 4, 1777.

**NARRATIVE.**

David and Hugh Mitchell, as creditors of William Donald, led an adjudication against him, and obtained decree, dated August 9, 1777. Prior to obtaining this decree of adjudication, they had used arrestments in the hands of Agnes Carson and her husband, on the supposition that the price had not been paid, and that she was still the debtor of Donald. Agnes Carson then raised a process of multiplepinding, and also a suspension of the decree which Fergusson had obtained in absence.

By decree, dated March 3, 1779, the Court found that Fergusson was entitled either to payment of the price of the house, or to a disposition to the house in security of the price. Agnes Carson having reclaimed against this interlocutor, the Court, by interlocutor of March 11, 1779, found, That David and Hugh Mitchell should be admitted as parties to the process, and remitted the cause to Lord Monboddo, Ordinary.

**July 11, 1779.** LORD MONBODDO found Agnes Carson and her husband personally liable to William Fergusson for the sum advanced by him, but preferred David and Hugh Mitchell, in virtue of the adjudication and infestment.

**Feb. 25, 1780.** Fergusson having represented to the Lord Ordinary against this interlocutor, his Lordship Found, "That though the feudal right of the subject still remained in the person of William

Donald, it could not be carried off by the adjudication of any of William Donald's creditors, except under the burden of the previous sale made by Donald of the subject, especially as the adjudication in this case was led on the 9th day of August 1777, after the subject had become litigious ; Therefore alters the former interlocutor, and finds, That the respondents cannot be preferred upon their adjudication."

MITCHELL  
v.  
FERGUSON.  
1781.

This interlocutor was acquiesced in by Agnes Carson, but was reclaimed against by the Mitchells. When the reclaiming petition and answers came to be advised, the Court ordered a Hearing in presence.

PLEADED FOR DISPONEE'S CREDITOR.—A person who grants a second disposition *in fraudem* of the first, is thereby guilty of a crime. This, then, is an act which the law will compel no man to perform. But will it interpose itself in the place of the disponent, and, in effect, do the very same thing by adjudication ? This is equally repugnant to common sense and to law. It is clear that a prior disposition, with or without infestment, is preferable to every subsequent personal one. It is likewise true that a subsequent disposition, by being clothed with infestment, becomes effectual against the prior remaining personal. This consequence, however, is widely different from that sought to be obtained in the present case. The *dolus* of the disponent, it is true, occasioned the second conveyance, which thus becomes valid in law ; but still the law by no means gives force or effect to that fraud.

ARGUMENT FOR  
DISPONEE'S  
CREDITOR.

The Statute 1617 has appointed Records as the medium through which information concerning the conveyance or the burdening of lands is to be communicated. If a *bona fide* purchaser, who, upon the faith of this legal information, bargains and pays his money, were, by a personal and latent deed of his author, to be cut out from his purchase, his situation would be more severe than that of the person who had obtained that deed ; because, besides labouring equally with the latter, under the deceit of his author, he would also have been deceived even by the law itself, which had established the credit of its records. But as it is merely through a just confidence in these that a

MITCHELL  
v.  
FERGUSON.  
1781.

second disponee is rendered secure, so a posterior adjudging creditor, who did not contract in reliance upon them, but trusted solely to the personal security of his debtor, can no more exclude an anterior disponee without infestment than with it appearing on record. So far as concerns the lands adjudged, the latter has no *bona fides* to plead respecting either his debtor or the law. Had he not relied on his debtor's personal security merely, he would have taken heritable security. A disponee, therefore, is entitled to demand the subject conveyed, according as it appears from the records. An adjudger, on the other hand, having no reliance on these, must be contented to take that which he has adjudged, *tantum et tale*, as it stood in the person of his debtor.

This doctrine is confirmed by the following additional authorities :—Dirleton's Doubts, *voce Comprising*, and Sir John Stewart's Answers, where it is laid down that rights pass to adjudgers *cum sua causa et labe*. The decisions from 1670 downwards, as stated by Stair, support back-bonds against adjudgers. The case of Neilson, 28th January 1755, comes still closer to the point. Also Gibb v. Livingstone, 14th December 1763. In that of Bell v. Gartshore, 22d June 1737, the distinction between adjudgers and disponees not having been stated was not attended to. See likewise Menzies v. Gillespie, 8th December 1761.

ARGUMENT FOR  
ADJUDGER.

PLEADED FOR THE ADJUDGER.—The nature of feudal rights is such that they cannot be affected, qualified, or burdened by any personal deed. A conveyance, so long as it continues personal, does not divest the disponee. The feudal right still remains in him.

This principle is firmly established by the judgment of the Court in the case of Bell v. Gartshore, in which, it is true, the argument with respect to adjudgers taking only *tantum et tale*, was not touched, a sign of its not being solid. The only question then agitated was, Whether a personal disposition were not sufficient to denude the disponent of a feudal right remaining merely personal? But the principle of that decision, which likewise determines the present question, is, that personal deeds cannot affect feudal rights. From this principle it arises, and

not from any effect of *bona fides*, that a second disponee, the instant that he is infeft, excludes the prior remaining without infeftment. For, though *mala fides* may cut down a title, no *bona fides* can of itself create a right. Even the Statute 1617, on which the disponee chiefly founds his argument, is a strong authority for the adjudgers on this point. It has prescribed the registration of sasines and reversions ; and why not also of dispositions ? The reason is, that the former, in their nature real, may qualify a feudal right, which the latter, being personal, cannot.

MITCHELL  
r.  
FERGUSSON.  
1781.

The argument, that the law ought not to do what the disponent himself could not lawfully do, is quite deceitful. A bankrupt debtor cannot, indeed, lawfully dispoise to any of his creditors in prejudice of the rest ; but is none of them entitled to adjudge ? Again, if a man grants one disposition without procuratory and precept, and afterwards to another disponee, a second with both, he cannot, it is true, *bona fide* execute a third conveyance in favour of the first disponee ; yet surely this disponee is not precluded from leading an adjudication in implement. All the decisions quoted on the other side, as also the opinions of Dirleton and Stewart, refer to the Act 1621, and to those fraudulent rights acquired in contravention of that Statute, which an adjudger must take *cum sua labe*.

Were the opposite doctrine to be received, many opportunities would be afforded for the commission of fraud. Marriage contracts are sometimes framed in the English form, bearing a conveyance *de præsenti* to trustees, who may not perhaps infeft themselves. Creditors, ignorant of this conveyance, lend their money, lead adjudications, and justly think themselves secure. Upon the footing of this doctrine, however, the trustees, by that personal deed, would exclude them. Or suppose a man owing debts to grant an heritable bond without infeftment, and afterwards to borrow money from other creditors, who, for their security, adjudge. By that latent bond, according to the same doctrine, they may be totally cut out.

The plea of the adjudgers is also supported by these authorities :—Ranking of the creditors of Sir John Douglas of Kelbead, 22d February 1765 ; Countess of Caithness, and Lady Dorothea Primrose v. Creditors' Adjudgers of the Earl of Rosebery.

MITCHELL

FERGUSSON.

1741.

JUDGMENT.

Feb. 13, 1781.

OPINIONS.

MS. Notes,  
Elphinston's  
Session Papers.

The Court Found, "That the adjudication and infeftment following upon it are preferable to the personal disposition founded on by Fergusson."

LORD MONBODDO observed,—“It was well urged from the Bar, that in this case the respondents were insisting that the Court should do what it would have been a crime in the party to have done. There is no doubt, if the seller had granted a second disposition, and the second disponent had *bona fide* taken infeftment, he must have been preferable. There is as little doubt, that of two dispositions without infeftment the first would be preferable, *prior tempore potior jure*. Had this adjudication remained without any infeftment, the same rule would take place, and therefore the question comes to the effect of this infeftment. The respondent here did not lend his money on the faith of heritage, or trusted in lending to the faith of the records ; but finding he was not like to get payment, seizes the debtor's estate by adjudication. This is the capital distinction between purchasers or heritable creditors and personal creditors who lead adjudications, who, it is clear, contract not on the faith of the records, or trust to the heritage of their debtor. Lord Dirleton lays down this distinction between purchasers and adjudgers. The decisions of the Court from 1670 the same. In a case recorded by Lord Stair, a backbond was effective against an adjudger ; and Lord Stair gives his opinion, that neither law nor custom made any distinction whether infeftment taken or not on the adjudication. The case of Neilson, in 1755, which I have collected myself, is to the same effect ; and I have seen Lord Kilkerran's Notes on his papers, and I find them agreeable with what I have collected. The case of Lord Rosebery laid down that an adjudication could carry no more than was in the debtor, and that the exception of fraud or minority was effectual against the adjudger. The case of Gibb *v.* Livingston in 1763. In all these cases the distinction between an adjudger and a purchaser was held as established. In the case of Bell of Blackhouse, in 1737, this distinction between an adjudger and purchaser was not so much as mentioned.”

LORD BRAXFIELD.—“If the doctrine just now mentioned be



adopted it would draw deep in its consequences, and give rise to innumerable frauds that would not be easily checked. Suppose a man should get a person to lend him on an heritable bond, containing a warrant to infest to £20,000, and he takes no infestment; others seeing the debtor in right of the estate, and nothing on the record to shew a burden on it, they lend large sums, and afterwards adjudge; if Lord Monboddo's doctrine well-founded, though the adjudgers were infest, the heritable creditor has only to appear and produce his heritable right, and tell the adjudgers there is nothing for them, they could only take with the burdens competent against their debtor; therefore his latent heritable right must be effectual. The same with regard to trustees in marriage contracts, and numberless cases. This most dangerous. The principle of the feudal law is clear, that no feudal right can be burdened with a personal right; and if the feudal right remains in the debtor, the adjudger takes it out of him by the adjudication. The Statute 1661 affords a strong argument in favour of the respondents. The reason that dispositions are not ordered to be recorded is, that they are mere personal deeds. There never was a cause judged with more solemnity, nor by abler judges and lawyers, than the case of Bell of Blackethouse. The papers were written by Lord Arniston, then at the bar. It is a clear judgment in favour of the respondents. It is said, the distinction between a purchaser and adjudger was not stirred there. The reason is, that the Counsel must have been of opinion that it was not tenable, therefore not pleaded for. I cannot presume it was not thought of. I have always understood the law to stand so; and it would cut deep to find otherways. The argument is, that here the Court is sought to do what the party could not do, and what would have been criminal in him to do. That would be going very far. No man, when bankrupt, can give a voluntary right; but will it from thence follow that his creditors cannot adjudge because it would have been fraudulent in his debtor to give him a voluntary right? All the decisions appealed to by the other party, and also the opinion of Dirleton, applies to cases where the person in the right of the estate had a fraudulent right; and I am clear in that case, that an adjudger must take the right *cum sua labe*; but that nothing to do with this case."

MITCHELL  
v.  
FERGUSON  
1781.

MITCHELL  
v.  
FERGUSSON.  
1781.

LORD GARDENSTON.—“I am clearly of the last opinion, and for adhering to the feudal principles. I see no danger from doing so ; but I see great danger from a contrary judgment. An adjudication requires time and public proceedings ; and a disposition may be got in an hour, and much mischief may follow. An honest disponent never can be hurt unless supinely negligent. I am for adhering.”

LORD PRESIDENT MILLER.—“I thought Mr. Rae’s argument plausible ; but on considering the matter coolly, I am come to be clearly of opinion that the personal deeds of the debtor cannot hurt an adjudger in cases such as the present, where the right of the debtor stands acknowledged by both parties. I have heard the case of Bell of Blackethouse held as law by great Judges—ELCHIES, DUNCAN FORBES, ARNISTON, KILKERRAN ; all of whom held that as fixed law ; and without overturning that decision, I cannot alter the interlocutor. The case of Forrester, in 1664, observed by Lord Stair, does not hurt this opinion, as it is there taken for granted that the back-bond could not be effectual against an adjudication. I am clear for finding that the adjudication and infestment cannot be burdened with the personal right.”

1. The observations of LORD MONBODDO and LORD BRAXFIELD are thus given by Lord Hailes in his Decisions. LORD MONBODDO,—“Here the price was honestly paid ; possession was held for seven years ; and the purchaser was in the course of completing his titles : a personal creditor steps in, adjudges, is infest, and now seeks to carry off the subject. This is unjust. The original seller could not have conveyed to that creditor, without a crime. Can the law do that for

a man which he could not do himself? If both rights had remained personal, the minute of sale would have been preferable, as being prior in date ; and therefore the only ground of preference claimable is on account of the infestment. What can be the effect of that infestment? The disponent contracted on the faith of the records, but the adjudger did not. When men lend money on the faith of the records, it is not on personal security that they lend : when they lend money on the faith of the re-

cords, they take heritable security. The infestment here is no more than a completing of the diligence, which, before infestment, was only inchoated. I do not say that the infestment has no effects. No: it makes the person infest the first effectual adjudger, and it prefers him to any posterior real right. If transferred to a third party, it would be preferable to the minute of sale; because there the assignee acquires on the faith of the records. This would be mere speculation, were it not for the opinion of lawyers, and the series of decisions to the same purpose as my argument. There is a series of decisions, from 1670, Kennedy, to 1775, Neilson. In the last case there was probably an infestment; and there was no minute of sale, but merely a ground of eviction. The case of Rosebery is also to the same purpose, and also the case of Gibb, in 1763. I see nothing on the other side except the case of Bell of Blackethouse, in 1737. That case went far, but we must not go any farther."

2. LORD BRAXFIELD,—“If the doctrine now advanced were to be held as law, strange consequences would ensue and exceedingly hurtful. Innumerable frauds would take place. For example, a man borrows money on an heritable bond: no infestment follows. Other creditors go on trusting him; they at last adjudge, and take infestment. According to the doctrine now pleaded, this would be good for nothing: the heritable bond would exclude them all: the first creditor would carry off the ker-

nel, and leave the shell to the adjudgers. Again, suppose that, in a marriage-contract, the estate is conveyed to trustees, for behoof of the heirs of the marriage,—the trustees, instead of taking infestment, suffer the father to continue in possession: the father contracts debts to the value of the estate,—his creditors will be cut out by the trustees. A second disponee, with first infestment, is preferred to the first disponee. This is admitted: but it is said that the case is different as to adjudications, which take the estate, *tantum et tale*, as it was in the author. It is answered,—The principle is, that feudal rights are not to be affected by personal. As to *bona fides*, although *mala fides* may cut down a right, *bona fides* cannot establish a right. The Act 1617 says nothing to the contrary. Reversion qualifies an infestment, however latent it may be. To prevent that inconvenience, the clause was thrown in in favour of purchasers. Dispositions are not mentioned in the Statute, for they do not affect the feudal right. The judgment in the case of Blackethouse was solemnly determined. The distinction now sought to be made was not made there, because the lawyers thought it not tenable. The difficulty there was, that these were only personal rights. The principle of the decision is, that a feudal right is not affected by a personal deed. It is much insisted on that the debtor himself could not have granted a disposition to Mitchell, and therefore that the law could not grant such disposi-

tion by adjudging. Answer,—A bankrupt cannot grant a disposition to any particular creditor, but any particular creditor may adjudge. There is no occasion for impugning former decisions: all of them apply to the case of conjunct persons adjudging. That is a fraudulent right; and he who adjudges must take the estate *cum sua labe*: that also is the case in *Dirleton*.”—*Hailes’ Decisions*, vol. ii. p. 879.

3. In the case of *IRELAND v. NEILSON*, February 8, 1755, reported by Lord Momboddo, and referred to by him on the Bench in the case of *MITCHELL v. FERGUSON*, Ireland agreed to sell the lands of Caldow to Neilson of Corsock. As Ireland had not made up titles to the lands, he granted a trust-bond to Neilson for £600, upon which Neilson led an adjudication and was infest. Neilson afterwards became bankrupt, and upon his death his creditors led adjudications against the lands. A process of sale of the lands was then brought at the instance of Neilson’s apparent heir. Pending the process of sale, a petition was presented to the Court by the grandson of Ireland, who was then deceased, representing that his grandfather had in 1736, in the contract of marriage of his son, disposed to his son and his heirs the lands in question, heritably and irredeemably, and that Neilson, knowing of this contract of marriage, and that his grandfather was divested of all right of the lands, fraudulently transacted with him for the purchase of the

same, and that Ireland being a weak facile man, Neilson had imposed upon him and got the lands at an undervalue. Ireland’s creditors denied that their debtor had been guilty of any fraud, and *pleaded*, farther, that supposing he had acted fraudulently in obtaining the lands, such fraud could not prejudice them, his lawful creditors, who had adjudged the lands as property vested in the person of their debtor, as it could not be pretended that they were partakers of any part of the fraud alleged against their debtor. LORD MURKLE, Ordinary, allowed the pursuer to prove that John Neilson of Corsock was in the knowledge of old Caldow’s disposition to his son of the lands of Caldow, in his son’s contract of marriage, when he made the transaction with him for the purchase, and also of the value of the lands, with all other facts and circumstances, tending to infer fraud on the part of Corsock in the said transaction, and allowed the heir and creditors of Corsock a conjunct probation. On advising the proof, the Court “Found the reasons of reduction relevant and proven, and that the same are effectual against the adjudging creditors of John Neilson of Corsock, as well as his apparent heir, and therefore ordains the lands of Upper and Nether Caldow to be struck out of the sale of the estate of Corsock, and reduce the said John Neilson’s charter and sasine of the said lands of Caldow produced, and decern accordingly.”

4. In a petition against this in-

terlocutor the creditors PLEADED, —It is an established principle that no back-bond or personal right granted by a disponent of lands who has completed his right by infestment, can affect in any degree a purchaser or singular successor from such disponent. This forms the basis of the security of feudal rights and the faith of the records, and therefore it is that land-rights cannot be qualified or burdened by any latent personal obligation of the disponent. No personal back-bond, therefore, nor declarator of trust, nor other personal obligation of any kind that could have been granted by Neilson to Ireland can affect a singular successor acquiring right *bona fide* to the lands. The objection of fraud that is made to the right which Neilson obtained from Ireland, however it may operate against Neilson or his heirs, cannot be effectual against his singular successors who contracted with him *bona fide* upon the faith of the records, seeing that the absolute and irredeemable right to the lands was vested in his person. Fraud is but a personal objection, good against the committer and his heirs, but ineffectual against singular successors. A person who is induced by fraud to consent, nevertheless adhibits his consent, and tradition following that consent, constitutes an alienation, and vests the subject in the disponent. The disponent who is fraudulently induced to contract, has an action against the disponent to compel him to restore the subject if it is in his possession, or to pay dama-

VOL. III.

ges. This, however, is a mere personal action against the disponent, and does not infer any *vitium reale* upon the subject disponent. The subject may therefore be effectually conveyed to an honest purchaser, who will not be answerable for the fraud of his author. The term singular successors applies to all persons acquiring right from the committer of the fraud by any legal title whatever, other than his heirs or universal successor, or perhaps also his gratuitous disponents. In sound reason there is no valid distinction between a purchaser and an adjudger. A purchaser acquires his disposition by the will of the granter, and the adjudger acquires his by the interposition of the law, but both are equally effectual when obtained. In one sense, it is true, the subject is taken in both cases only *tantum et tale* as it was in the debtor. The subject remains liable to all the real burdens which affected it before the purchase. But it is free from any latent personal claim or objection competent against the author or his heirs, and which was not real upon the estate. Such personal claims cannot affect singular successors in the lands, whether the right is transferred by a voluntary or a legal disposition. The Court "Adhered."

5. In his Decisions LORD MONBODDO observes,—“ In this case the Lords decided a very general point of law, and of considerable consequence: They found that if a sale of lands was fraudulent upon the part of the buyer, though the

right was completed in his person by charter and sasine, before any challenge brought, yet his creditors adjudging the subject from him, and noways in the knowledge of the fraud, were liable to reduction *ex capite doli*, and that without distinction, whether the adjudgers had completed their right by infestment or no; for the Lords thought that an adjudger could only take the subject *tantum et tale* as it stood in the person of the debtor, that is, liable to be evicted upon his back-bond or other personal deed, and also for his fraud, in the same manner as an arrestment gives the subject, just as it was in the debtor's person; for which reason it is that an arrester is not considered as an ordinary assignee, but the oath of the debtor in the debt arrested proves against him as well as it would have done against his debtor. This judgment the Lords gave unanimously, and the President said it had been before so adjudged in a case which he mentioned, *dissentiente tantum* Kaimes, who said he could not make the distinction betwixt a voluntary disponee and a legal disponee or adjudger; and he thought the case of an arrestment was not similar, because an arrestment did not give the property of the subject as an adjudication does. But there seems to be some difference in the nature of the thing betwixt a purchaser who lays down his money and buys upon the faith of the records, and a creditor, who, for a debt not contracted upon the faith of the lands, adjudges from the creditor what he

can get. If a creditor in such a case will have the security of the records, he should take an heritable bond upon the lands; and that, it is believed, would make him as safe as a purchaser."—*Brown's Supplement*, vol. v. p. 828.

6. The notes by LORD KILKERRAN on the case of NEILSON v. IRELAND, to which LORD MONBODDO referred on the Bench, are these:—"That singular successors in land-rights completed by infestment are not affected by back-bonds, or other personal rights, or the fraud of the author, when the acquirer is not *particeps fraudis*, is a point so established, that it needs no argument. It is the very purpose of our records, on the faith whereof we are in safety to purchase. But, *first*, If no infestment has followed, and that the purchaser has only a personal right or disposition, that disposition, or other personal right, is affected by the personal deeds or fraud of the author, as all personal rights are. And, *secondly*, The rule only holds in the case of singular successors by voluntary rights of property, whereon infestment has followed, but not in rights in security as infestments of annual-rent, as these being only securities of the personal obligation, whatever extinguishes the personal obligation in security whereof such infestments are granted, extinguishes the infestment. And the records were not intended to secure purchasers of such rights. And, *thirdly*, The case is the same with respect to adjudications, which in like manner are but

securities, and whatever will extinguish the personal obligation on which the adjudication is led will extinguish the adjudication, and that not the less that infestment has followed upon it. And if so, that a back-bond qualifying such personal obligation, or a discharge of it, will extinguish the ground of the adjudication, the fraud of the person acquiring such personal obligation must have the same effect, however *bona fide* the purchaser of such adjudication may acquire it. To apply this to the present case; if the original purchase was fraudulent, as made when Corsock was in the knowledge of Ireland's prior right, the bond taken to be the foundation of an adjudication to effectuate that purchase was no less so; and according to the above principle, that fraud must affect his creditors adjudgers.—February 8, 1755. This petition was refused. KAIMES *solus* of a different opinion. After stating what is above in support of the interlocutor, which was thought just, especially by the President, who approved, and added, that not only was he of opinion of the interlocutor on the ground that it was a redeemable right, as had been said; but on this ground, that the creditors were only adjudgers, and that an adjudication carries the subject only *tantum et tale*, liable to all the exceptions that the right was liable to while in the person of the adjudgers' debtor. KAIMES put his opinion upon this, that fraud is but personal, and cannot, in the nature of the thing, affect a *bona fide*

onerous purchaser; and he saw no difference between a voluntary purchaser and a legal purchaser by adjudication. Answered,—That by our law personal rights, or *nomina*, are affected as by the voluntary deeds, so by the fraud of their author. And if it be put upon this, that Corsock was infest, then the question turns upon the records, and these are only intended to secure voluntary purchasers of irredeemable rights."—*MS. Notes, Kilkerran's Session Papers.*

7. The other case referred to by LORD MONBODDO in the case of MITCHELL *v.* FERGUSSON, was that of GIBB *v.* LIVINGSTONE. In this case Laurence Gibb, upon the narrative that he had borrowed from Andrew Williamson, his son-in-law, the sum of £50, granted to him an heritable bond over a tenement in St. Andrews. The bond was adjudged by Livingstone, a creditor of Williamson. Janet Gibb, a creditor of Laurence Gibb, brought a reduction of the bond upon the first branch of the Act 1621. The first question was, Whether a reduction was competent against the defender, he being a creditor adjudger of the bond? The Court repelled the defence that adjudgers from a conjunct and confident person are not liable to the challenge arising from the Act 1621; but in respect of the particular circumstances of the case, found that the defender was not obliged to instruct the heritable bond in question. The pursuer then offered to prove by witnesses that the bond was gratuitous. The defender pleaded

that parole evidence was not competent to redargue the narrative of the bond, founding both upon the general principle that writing cannot be defeated by witnesses, and also on the tenor of the Act, which mentions only a proof by writing or the oath of party. The Court Found, "That it was competent to the pursuer, Janet Gibb, to instruct by facts and circumstances the grounds of her reduction, and allowed her proof, both by witnesses and writing, of the several facts mentioned in her condescendence." LORD HAILES in his Decisions observes,—“The Court were much divided, but I omitted to take down the names of the *dissentients*.”—*Hailes' Decisions*, vol. i. p. 103.

8. The case of *GIBB v. LIVINGSTONE* is thus reported by LORD MONBODDO,—“In this case the Lords determined that a reduction, upon the Act of Parliament 1621, is competent against the creditor adjudger of the confident person as well as the confident person himself; and Lord Auchinleck said, it was decided in the 1755, January 28, in the case of one Neilson, that a reduction of a sale of land, upon the head of fraud and circumvention, was competent against the adjudger from the buyer; and Lord Coalston said, he remembered a later case, Michael Menzies against Gillespie, where the like was found. But, in regard that, in this case, the action was against the adjudger, and on account of the long delay and other circumstances of the cause, they found that the *onus*

*probandi* of the insolvency, and the gratuitousness of the deed was incumbent upon the pursuer.—25th July 1766. This day they found that the pursuer might prove by writ or oath of party, and, consequently, that the defender was still to be considered as a conjunct or confident person, not as a stranger; for, in the case of a stranger, the narrative of the deed, bearing the money received, would have been *probatio probata*. See, in relation to this point, Home, 23d November 1725, Nairn, where the general point is very well argued; and a decision in Falconer, 21st June 1737, Gartshore against Bell, where this point was overlooked, and an adjudger considered in the same light as a purchaser.”

9. The case of *THOMSON v. DOUGLAS, HERON, and COMPANY*, Nov. 15, 1786, is frequently cited in support of the position that a personal creditor adjudging takes the right adjudged *tantum et tale* as it stood in the person of his debtor, and that although an heritable creditor is not, a personal creditor adjudging is, affected by the personal obligations of his debtor. In that case the pursuer had disposed his lands to his man of business, heritably and irredeemably, in order that he might sell them, and apply the proceeds for behoof of his employer. The agent executed the procuratory of resignation contained in the conveyance, and obtained a charter on which he was infeft, but having omitted to insert in the procuratory any qualification of his right, he appeared on the record



as absolute proprietor. Being debtor to Douglas, Heron, and Company, he conveyed the lands to them in security of his debt. Afterwards other creditors adjudged the lands, but without taking infestment. The pursuer instituted an action of reduction, on the head of fraud, of the right obtained by his disponent, alleging that the latter had fraudulently failed to apply properly the right of the estate. In this action appearance was made for Douglas, Heron, and Company, and for the adjudging creditors. The Lord Ordinary Found, "That the reasons of reduction were not relevant to affect the security and infestment in the lands of Cowdenknows, granted by Mr. Armstrong in favour of Messrs. Douglas, Heron, and Company, nor to stop the process of sale of the estate at their instance, or at the instance of the other creditors of Mr. Armstrong over the said lands." This interlocutor was reclaimed against by the pursuer, and the judgment of the Court as given in the Faculty Collection, is as follows:—"The Lords found that the allegation of fraud was not relevant against the heritable securities and infestments, but that it was relevant against the creditors adjudgers." It was in consequence of this judgment that LORD PRESIDENT CAMPBELL ordered a hearing in presence in the subsequent case of *Pierce v. Russell*, January 31, 1792, when the judgment in the case of *Thomson v. Douglas, Heron, and Company*, was declared to be erroneous.

10. In reference to fraud affecting feudal rights, LORD STAIR observes,—“The fourth common exception is, *ex capite doli mali*, viz., that the pursuer's title and right was obtained by fraud. But this is not relevant against all actions, as the former exceptions were. For if the title be rights of lands or annualrents, fraud is not competent by exception but by reduction. Neither is it competent to be proponed as a reply or duply; because superiors and others having interest must be cited, and the production must be ended before debating of the reason of fraud. This ariseth from the special nature of feudal rights; and likewise fraud being of a criminal nature, it is not relevant against singular successors not partakers of the fraud, but only against the committers of the fraud and those representing them, especially as to feudal rights. For so it is expressly provided by the forementioned Statute. The reason whereof is, to secure land-rights, and that purchasers be not disappointed, and therefore no action can be effectual against them upon the ground of their author's fraud, unless they were accessory thereto, at least by knowing the same when they purchased, but supervenient knowledge will not prejudice them. But in personal rights the fraud of authors is relevant against singular successors, though not partaking nor conscious of the fraud when they purchased, because assignees are but procurators albeit *in rem suam*, and therefore they are in the same

case with their cedents, except that their cedents' oaths, after they were denuded, cannot prejudice their assignees. Yet in moveables purchasers are not quarrellable upon the fraud of their authors, if they did purchase for an onerous equivalent cause. The reason is, because moveables must have a current course of traffic, and the buyer is not to consider how the seller purchased, unless it were by theft or violence, which the law accounts as *labes realis* following the subject to all successors, otherwise there would be the greatest encouragement to theft and robbery. Fear and fraud have much the same effects as to singular successors, except in the case of robbery, which, as well as theft, is *vitium reale* in moveables, and therefore what has been said of fraud on that point need not here be repeated."—*Stair*, IV. xl., 21 and 28.

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## II.—WYLIE *v.* DUNCAN.

Dec. 8, 1803.

NARRATIVE.

In 1800 James Wylie sold certain tenements to Robert Archibald. Infestment was taken by Archibald on the conveyance in his favour. The conveyance was absolute and irredeemable. A missive, however, was granted by Archibald to Wylie, binding himself to resell the subject at the same price which he had paid for it, at any time, on his receiving six months' previous notice, and on his being allowed the expense of repairs and meliorations. This missive was of the same date with the disposition; and the seller continued to possess the subjects, notwithstanding the disposition to Archibald.

In 1801 Archibald's estate was sequestrated, and the trustee being infest, sold the subjects which had been purchased from Wylie. Wylie then produced the missive letter, and insisted that the transaction between him and Archibald was not intended as a sale of the subjects, but merely as a security for a loan, and that he was entitled to redeem the subjects upon payment of the sum borrowed. To enforce the claim, he brought an action against the trustee before the Magistrates of Glasgow, concluding that he should be obliged to redispone the subjects upon payment of the original price, with interest, in terms of the missive. The Magistrates assoilzied the trustee;

and he completed the transaction with the purchaser, by executing a disposition in his favour.

An action of reduction was then brought by Wylie before the Court of Session, for the purpose of having the decree of absolvitor pronounced by the Magistrates of Glasgow set aside.

WYLIE  
v.  
DUNCAN.  
1808.

PLEADED FOR THE PURSUER.—The object of parties in the transaction was merely to create an heritable security to a certain extent over the subjects. It is evident there was no intention in the proprietor to sell, both as the sum paid was not equivalent to the value of the property, and as the original owner retained the possession. The disposition in favour of Archibald, and the missive granted by him to the pursuer, are component parts of the same transaction, and amount to nothing more than an heritable security in favour of Archibald, with the ordinary power of redemption contained in heritable bonds and dispositions in security. But even although the transaction were held not strictly to fall under the notion of an heritable security, it must be considered as a species of trust vested by the pursuer in Archibald; and, consequently, in terms of the Act 1696, he is entitled to prove the trust, either by Archibald's written declaration or by his oath.

ARGUMENT FOR  
PURSUER.

The trustee for a bankrupt's creditors can only take that right or interest in the estate which belonged to the bankrupt himself. The act of bankruptcy cannot create a new right, or make a conditional right absolute. The trustee must take the property *tantum et tale* as it stood in the person of the bankrupt; and if the property was subject to redemption, or was fiduciary in the person of the bankrupt, it must remain so in the person of his trustee.

PLEADED FOR THE DEFENDER.—This right acquired by Archibald over the subjects was completed by a disposition and infeftment *ex facie* irredeemable. It is now vested in his creditors, who have contracted on the faith of the Records. Although the creditors must take this subject *tantum et tale* as it stood in the person of his debtor, with respect to any real burden affecting it, they are not bound by any of his personal obligations. The missive letter, upon which the pursuer rests

ARGUMENT FOR  
DEFENDER.

WYLIE  
v.  
DUNCAN.  
1803.

his claim, is not binding on the creditors. In order to constitute a real burden on lands in the person of singular successors, it is necessary, *first*, That it be clearly expressed as a burden in the investiture ; and *second*, That it be expressed as a real burden on the lands, and not as a personal burden undertaken by the disponent. A voluntary purchaser might have acquired a sufficient right from Archibald to the subjects in question ; and the case of creditors is not less favourable with that of purchasers.

Interlocutor of  
Lord Ordinary.

LORD WOODHOUSELEE, Ordinary, Found, “ That whatever might have been the plea of onerous creditors of the disponent, contracting with him on the faith of a right apparently absolute to the subject in question, the trustee on Archibald’s sequestrated estate is not entitled to urge that plea, but must take the subject disposed to him *tantum et tale* as it stood in the debtor’s own person, and therefore subject to the same right of redemption ; therefore, and before farther answer as to the merits, ordains Robert Archibald to depone on the verity of his subscription to the missive.”

JUDGMENT.  
Dec. 8, 1803.

The trustee having reclaimed, the Court “ Altered the interlocutor reclaimed against, and assolizied the petitioner from the action of reduction.”

OPINIONS.  
MS. Notes,  
Baron Hume’s  
Session Papers.

At the advising, LORD PRESIDENT CAMPBELL observed,— “ This is an important case. Trustee was infeft before Wylie took any measures to complete his feudal right. *Tantum et tale* has often been pleaded against adjudgers ; and if good against them, would be so against trustees. But the law for some time has held otherwise. Authorities in the papers are not to the purpose. But there are authorities in point. See 24th May 1799, Buchan v. Farquharson ; also Kilkerran, pp. 384, 385. *Tantum et tale* is good as to objections, which go to the extinction of the subject adjudged ; *e.g.*, if heritable bond adjudged, extinction is a good answer. If right qualified *gremio*, that is also a good answer. But if not, as here, and not going to extinction, it is a mere personal matter, which touches not the adjudger more than a lender on heritable bond.

LORD MEADOWBANK.—“ I agree in the general doctrine. Nothing in answer moved me but the notion of a trust, which, if established by a back-bond, I think would affect adjudgers. But on the whole, I rather think that it is an obligation to resell, so can only found a claim of damages.”

WYLIE  
v.  
DUNCAN.  
1808.

LORD ARMADALE.—“ It is not of the nature of a trust. I hold, and *wish* to hold it as law, that an *ex facie* absolute feudal right is not qualified by a latent back-bond in a question with creditors more than with purchaser.”

LORD PRESIDENT CAMPBELL.—“ I convey my estate absolutely to a friend, and take a back-bond of trust. If he sells it as for himself, or gives an heritable bond over it, the purchaser or lender is safe. As to an adjudger, *if there is* any doubt, let us solemnly hear the case. But I hold that there is none. He takes on the faith of the record, not *tantum et tale*. Fraud is real evidence in assignments of claims of debt, but not as to heritable rights, nor to *ipsa corpora* of moveables, nor in conveyance of bills.”

LORD MEADOWBANK.—“ I have no doubt of the general proposition.”

LORD WOODHOUSELEE.—“ I went on the old law, but I am now satisfied.”

1. On the Session Papers in the case of WYLIE v. DUNCAN, LORD MEADOWBANK has written,—“ Court unanimous that a trustee on a bankrupt estate is not affected by personal declarations even of trust, unless contained in the deed of conveyance of the heritable subjects. These obligations transmit the fraud, not the obligation separate and latent. I first doubted as to this extent of the doctrine, but yielded. I never had any doubt that *tantum et tale* did not apply to adjudgers.”—*MS. Notes.*

2. In the case of BUCHAN v. FARQUHARSON, May 24, 1797, referred to by LORD PRESIDENT CAMPBELL, in the case of WYLIE v. DUNCAN, the question was,—Whether an assignee to a personal bond, who had made intimation after his cedent's sequestration, but before the estate had been vested in the trustee, was to be preferred to the trustee? The Court preferred the assignee “in respect of the assignation challenged being completed by intimation prior to the disposition from the bankrupt

vesting the estate in the trustee." In the Faculty Report, what occurred at the advising is thus stated :—"OBSERVED ON THE BENCH—The trustee on a bankrupt estate will be preferred to a creditor claiming on a voluntary disposition, granted before the sequestration, if the right of the trustee be first completed. And therefore the propriety of the decision, 8th December 1795, Taylor and Smith against Marshall, in so far as it went upon the supposition that the trustee in such case is bound to make good the previous voluntary disposition, may be doubted. But, on the other hand, the mere act of sequestration, while it disables the bankrupt from disposing of his property voluntarily, does not, at common law, prevent a creditor from completing his right by legal diligence, or by any act independent of the consent of the debtor, such as intimating a previous assignation. The incompetency of arrestments and poindings arises entirely from the enactment of the Statute."

3. On the Session Papers, in the case of *BUCHAN v. FARQUHARSON*, LORD PRESIDENT CAMPBELL has written,—"**PERSONAL AND REAL.** Whether the right of the trustee under a sequestration is qualified by incomplete conveyances or securities previously granted by the bankrupt? In the case of feudal rights requiring infeftment to complete them, it may with reason be maintained that the first infeftment must be the rule; and therefore, if the trustee is first infeft upon his disposition from

the bankrupt, a prior disponee or creditor by heritable bond will be excluded if his infeftment be posterior to that of the trustee; and the same may be the case where the Court, in consequence of the Bankrupt Statute, pronounces an act or order, adjudging the estate to the trustee, and charter and infeftment follow. But what if the prior disponee or heritable creditor completes his real right by infeftment in the interval between the sequestration and the said disposition, or act of the Court and infeftment of trustee? The present act makes the adjudication effectual from date of first deliverance. As to rights of a personal nature, it must have been understood both by the former and present act, that the sequestration was to have complete effect as to these, otherwise arresting and poinding ought not to have been prohibited.

4. "But let this be as it will, it seems impossible to maintain that the right of the bankrupt, whether to his real or personal estate, passes only *tantum et tale* to the trustee; and therefore that the right in him for behoof of the whole creditors must be understood qualified by all the latent and incomplete transfers or conveyances which may have been previously granted in favour of individuals. The general plan of the Bankrupt Act was to supersede diligence of every kind, and consequently to make a complete transfer to the trustee for the general behoof, as effectually as if the most complete diligence had then been done. The trustee, therefore, must be entitled to com-

pete with individual creditors, and he must take the whole personal effects in the same manner as if he had attached them by arrestment or poinding, or got a right to them by intimated assignation at the period of the sequestration. It is thought, too, that the interlocutor which the Court pronounced in the case of *Smith's Creditors*, 8th December 1795, was erroneous, as proceeding upon a misapprehension of the rule *tantum et tale*. The doctrine of *tantum et tale* in adjudications has sometimes been misapprehended. The adjudger of a debt must no doubt take that debt as it is; and suppose he conveys it to another, the singular successor must do the same, subject to any objection of payment

or extinction. See *Kilkerran's Cases*, Personal and Real, p. 381, and case of *Russell v. Ross*, 31st July 1792. But an adjudger is entitled to complete his right upon the faith of the Records, just in the same way as a voluntary disponee. The great difficulty here is, Whether the sequestration has complete effect from the beginning, or only from the period of disposing or vesting? See the clauses against arrestment and poindings. In the present case the assignation was intimated before the act of vesting. This made no difference under the present Act, 33 Geo. III., but it did under the former Act."—*MS. Notes, Sir Ilay Campbell's Session Papers*.

### III.—STEWART'S TRUSTEE v. WALKER'S TRUSTEES.

James Stewart of Dunearn was proprietor of several contiguous parcels of land, which were commonly known under the general denomination of Hillside, but that name properly belonged to a single parcel of about five acres in extent. The other parcels were held by separate titles with specific names, and in some of the parcels Stewart was not infeft. In 1823 he entered into a transaction for a loan of £10,000 over his whole property, known by the name of Hillside, and he transmitted to the agent for the lender a valuation of the whole property, which had been made with the view of effecting the loan. According to this valuation, the whole property was estimated at £21,653. The five acres constituting Hillside proper, were estimated at not more than between £1000 and £2000. The loan was agreed to, and the description of the lands given in

April 10, 1835.  
NARRATIVE.

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.

1835.

the bond executed was that which applied merely to the five-acre parcel of Hillside proper. Infestment passed upon the bond.

In 1828 Stewart's estates were sequestrated under the Bankrupt Statute, and the pursuer was elected trustee, and the usual decree of confirmation and adjudication was pronounced in October 1828 ; but no sasine was taken by the trustee till August 1829, when he was infest on a disposition by Stewart.

In May 1829, it having been discovered that the descriptions in the bond comprehended Hillside proper only, and did not comprehend the other parcels contiguous, Stewart granted to Professor Walker, the creditor in the bond. a bond of corroboration, narrating the previous proceedings, and setting forth that it was understood and agreed at the time, that the description of lands engrossed in the original bond, and transcribed from the titles exhibited, covered the whole of the lands. Stewart therefore conveyed to Professor Walker the whole property, by the special description of the several parcels contained in the respective titles, in confirmation of the original security. On this bond of corroboration infestment was taken in July 1829, a month prior to the infestment taken by the trustee.

The trustee thereafter raised an action of reduction founding on the Acts 1621 and 1696 and the Bankrupt Statute, and concluding to have the bond of corroboration set aside as a contravention of those Statutes, and a fraud against the other creditors.

One of the points raised in the action was, Whether supposing the bankrupt could not by any act of his own better the condition of the creditor, the trustee had acquired the lands, subject only to the burdens appearing on the face of the records, as a purchaser would have done ? or, Whether he did not take the right to the lands qualified as it stood in the person of the bankrupt, more especially as regarded those parcels of land to which the bankrupt's right was personal merely ? Another question was, Whether at all events the transaction did not amount to a fraud on the part of Stewart, which must necessarily affect the creditors, so as to bar them from availing themselves of it ?



PLEADED FOR THE PURSUER.—The extent of the doctrine of *tantum et tale* as finally settled by the decisions, appears to be this, that in the case of real rights, *i.e.*, rights to which the debtor has completed a feudal title, any qualifications not appearing *ex facie* of the titles, but depending upon relative personal obligations, are ineffectual even against creditors adjudgers. Farther, that in the case of personal rights to land, or *jura incorporalia*, where the title of the debtor is qualified by conditions inherent in the constitution of the right, a creditor adjudger can take the right only subject to those conditions, even although such conditions would be ineffectual against an onerous purchaser. This distinction was sufficiently explained by the decision in the case of *Gordon v. Cheyne*. It was there determined, that certain shares of a trading company, which had stood for a course of years in the name of the bankrupt, but which *ab initio* had been held by him only in trust, did not belong to the general body of his creditors, but to the individual for whose behoof the trust was created. This decision did not pass unanimously, but it went no farther than this, that creditors adjudgers are liable to be affected by conditions or qualifications inherent in the constitution of their author's right, while that right remains personal.

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1885.

ARGUMENT FOR  
PURSUER.

But the case is very different where an individual has himself acquired right by an unqualified title, either to land or a *jus incorporale*, and, in the enjoyment of that unqualified right, has come under an obligation, express or implied, to convey that right to another. The creditor in such an obligation, if he have failed to demand implement from the bankrupt himself previous to his bankruptcy, is not entitled to demand implement from the creditors of the bankrupt, or to hold that the bankrupt's title is qualified by the extrinsic personal obligation which he had so undertaken. Accordingly, in the case of *Mitchell v. Fergusson*, the disponee of a house not being infert, the creditors of the disponent adjudged, and were infert; and they were found preferable to a purchaser from the disponee.

It is true that in a subsequent case, *Smith v. Taylor*, some doubt was thrown upon the authority of the decision of the case of *Mitchell*, and the Court seemed to sanction the doctrine, that the general body of creditors could take the property of

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1885.

their debtor only *tantum et tale* as it stood in his person, and so must fulfil the obligation, even although only a personal obligation, which their debtor had incurred in relation to that subject. But, as Mr. Bell observes, "the erroneous opinion, however, which this judgment tended to sanction, did not long prevail;" and he refers, in support of this observation, to the case of *Buchan v. Farquharson*, 24th May 1797, and this is confirmed by the opinion of the Judges in the case of *Russell v. Ross's Creditors*, and by the still more recent case of *Wylie v. Duncan*. On these principles it is clear also that no distinction applies to the property which was not feudalized in the person of Mr. Stewart.

ARGUMENT FOR  
DEFENDERS.

PLEADED BY THE DEFENDERS.—Although a purchaser of a proper feudal right is not liable for the fraud of the seller, yet such fraud is available against an adjudger. The case of a *bona fide* purchaser, who makes his bargain and advances money solely upon the faith of the records, and who is entitled to trust to those records, has always been distinguished from the case of a personal creditor, who originally trusts merely to the personal security of the debtor, and not to the faith of the records. When such a creditor comes to lead an adjudication, he can by his diligence take no broader or better right than the debtor himself truly had, for he neither trusts, nor is entitled to trust, to these records. If that be the ground of distinction, it is manifest that it is totally immaterial whether the property attempted to be carried off by adjudication was originally the absolute property of the creditor, or was disposed to him by some third party, by a disposition *ex facie* absolute, although truly not intended to be so. In both cases the party appears the absolute proprietor upon the record. In both the question is, Whether his right be not purely a limited right at the date of the adjudication? and if the limitation, although not appearing upon the record, affects an adjudger in the one case, so it must affect him in the other. This distinction is noticed by all the writers on the law of Scotland, and has been recognised by a variety of decisions.

In like manner, creditors are liable to extrinsic obligations which limit or qualify the right of their debtor, although he

should appear *ex facie* to be absolute proprietor. This was solemnly decided in the case of *Gordon v. Cheyne*.

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1885.

LORD MONCREIFF, Ordinary, reported the case to the Court. In a Note his Lordship observed,—“ There is, however, great difficulty in the question upon the third ground of reduction, viz., That the deed was executed by the voluntary act of the bankrupt, after the sequestration and the confirmation of the trustee. When the point is stated in the abstract, there can be no doubt that no sequestrated bankrupt can effectually constitute a security over the estate by a voluntary deed. The estate becomes the property of the creditors, and there is an adjudication in the person of the trustee, by the act of confirmation ; and in this case, the adjudication was special, the whole lands having been enumerated. But the present case is not resolved by this general point. For, *First*, If the original contract be clear, and it be also clear that the first disposition was made imperfect by an error of Mr. Stewart, of a nature equivalent to fraud, the Court must determine, whether it is competent to the creditors or their trustee to avail themselves of such an error. Mr. Stewart held the estate, subject to a specific obligation to make the security good over the whole lands in the valuation. If the estate passed from him to his creditors, it could only pass as it stood in his person with that obligation ; and, according to the judgment, and more particularly the opinions delivered in the case of *Gordon v. Cheyne*, February 5, 1824, the creditors could only take the right of the bankrupt *tantum et tale* as he held it. *Second*, The adjudication in the person of the trustee did not divest the bankrupt feudally. An adjudication without charter and sasine has not this effect ; and, certainly, assuming the existing obligation for a specific security, an adjudication by the defender would have been competent after the trustee's confirmation ; and, if first completed, would have excluded him. The point of difficulty is, that here the security was perfected by the voluntary act of the bankrupt, and it has been frequently decided, that even diligence, in itself competent, will be invalid to give a preference, if the creditor has only been enabled to obtain it by the collusive aid of the bankrupt. But, *Third*, If there was a specific

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1835.

obligation to give the security, and if that obligation was binding on the creditors, the question is, Whether the pursuer has any legal interest to reduce it as granted by the bankrupt—whether the act itself would, in other circumstances, have been warranted or not? The deeds are valid in point of form, Mr. Stewart not having been denuded. And, if the thing done was an act of justice which the creditors might have been required to do, there can be no interest to reduce it. *Frustra petis, &c.* Though the question is one of great difficulty, the Lord Ordinary is inclined to think, that this is the just and the legal result. Mr. Walker never, for one moment, agreed to follow the personal faith of Mr. Stewart, or imagined that his money was lent otherwise than on the faith of a complete security over the specific lands agreed on. If the security stands, he will get nothing more than that which he had a right to believe was given at first, and which the creditors cannot take from him, without founding on the act of their constituent, by which he and his agent were deceived. There is a separate point in the case, relative to certain parts of the lands which were held by Mr. Stewart by personal titles. With regard to these, it seems to be clear, that the trustee must be bound by the latent equities, not limited to those which are in the constitution of the title. And the Lord Ordinary entertains no doubt, that if the security is otherwise not reducible, the defenders had a right to complete the title in the bankrupt. If the trustee had done so, it would have accresced to Mr. Walker's infestment. He could only avoid this by making up a different title, throwing the bankrupt out of the progress. But a creditor holding a specific security was entitled to put the matter right if he could. The result, in the Lord Ordinary's opinion, is, that judgment for the defenders ought to follow from the equity of the Statutes, and the general principles of law, under the cases of Cormack, Bontyne, Gordon, and other similar cases."

On the case coming before the Second Division of the Court, the Opinions of the whole Judges were directed to be taken.

OPINIONS.  
Lord Gillies,  
Lord Mackenzie,  
Lord Medwyn, and Lord  
Corehouse.

In the Opinion returned by Lords GILLIES, MACKENZIE, MEDWYN, and COREHOUSE, their Lordships observed,—“ But there

is another and a different ground on which, in their last argument, they rely with greater confidence. It is said, that although a *bona fide* purchaser is exposed to no objections but those which constitute a radical defect in the title of the seller, or in feudal property which appear on the face of the records, a creditor adjudger stands in a different situation, and takes the right adjudged, subject to the conditions, and under the equities, though latent, by which it was qualified in the person of his debtor; or, in technical phraseology, he takes it *tantum et tale* as his debtor held it. That this was at one time the doctrine of the law of Scotland, though not to the extent to which it is now maintained by the defenders, may be granted; and the case of Ireland, which they cite, and others to the same effect, shew the opinions at one time entertained. But subsequently to that period, the law has been settled otherwise, by a numerous and consistent train of decisions, which are not now to be called in question. Reference may be made to the following cases:—The Creditors of Douglas of Kelhead—the Creditors of Ross of Kerse—*Mitchell v. Fergusson*—and more particularly to *Buchan v. Farquharson*, in which a preceding judgment in *Smith v. Taylor* was unanimously pronounced to be erroneous. Afterwards, when *Smith* and *Taylor* came again before the Court, although an attempt to open up the interlocutor which had become final was unsuccessful, the Court, a second time, unanimously condemned the decision.

“ The defenders have perplexed this point, by referring to a class of cases, with which it is nowise connected. It is true that creditors attaching moveables by diligence, are not in the same situation as *bona fide* purchasers. Nothing except a *labes realis*, such as that which arises from theft or robbery, can be pleaded against the purchaser; while the arrester, or poinder, takes the subject under the conditions which affect the constitution of the real right in his debtor, but not under his personal engagements or liabilities on account of it. Thus, the exception of *dolus dans causam contractui* is pleadable against the arrester or poinder, while that of *dolus incidens in contractum* is not so. In illustration of this principle, various cases cited by Mr. Bell might be adduced; and, it may be added, that the distinction was received at a very early period into our law. In

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
—  
1885.

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1885.

the case of *Haitley*, reported by Lord Stair, a person had sold goods, and received payment of the price, though, in consequence of his fraud or fault, they were not delivered ; but, in a competition, his creditor, who had attached them by poinding, was preferred to the buyer. Even in the case of moveables, therefore, the creditor using diligence does not take them *tantum et tale*, as they stand in the debtor, that is, he is not responsible for the personal obligations of the debtor concerning them.

“ Incorporeal, and other personal rights, which pass by assignation, stood at one time in a different predicament. With regard to them, the maxim *assignatus utitur jure auctoris* was carried farther with us than in the civil law, from which it was borrowed. The assignee, whether a purchaser or a creditor, was held only procurator in *rem suam*, and, on that footing, subject to every exception maintainable against his cedent. But that rule, of which Dirleton doubted and Stair disapproved, was greatly modified, if not overturned, by the House of Lords, in the case of *Redfearne*, and the *bona fide* assignee of an incorporeal subject, for a price paid, placed in the same situation as the purchaser of a moveable. This decision, however, did not touch the case of a creditor adjudging an incorporeal right ; and therefore in *Gordon v. Cheyne*, the Court, with perfect consistency, decided that certain shares of the stock of a shipping company, which a bankrupt held in trust, were not carried by his sequestration, the trust, though latent, affecting the constitution of his right. It is in vain, therefore, for the defenders to argue, as they have done, that the decision in *Gordon v. Cheyne* revived the doctrine of *tantum et tale*, which was exploded in *Buchan and Farquharson*. It decided, that creditors adjudging an incorporeal right, were not in the same predicament with *bona fide* purchasers, but it did not deprive them of the privileges they formerly enjoyed, and it had no concern with heritable property at all.

“ On these grounds we consider it clear that the pursuer, as trustee for Stewart's creditors, took the heritable estate in which the bankrupt was infest, subject to no limitation or burden which did not appear on the face of the records ; and his moveable estate under such conditions only as qualified his real

right, but free from all his personal liabilities. If Stewart, therefore, in terms of his agreement, was bound to give Walker an heritable security over all the lands of Hillside, as well as Hillside proper, and nobody can doubt that he was so bound, that obligation, though effectual against himself and his representatives, is not transmitted against his creditors."

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
—  
1835.

LORD CRAIGIE observed,—“It is a rule established with us, Lord Craigie. beyond all memory, that there are no equities in competitions among creditors. This principle was adopted, and carried to its fullest extent, in the case of the Duke of Norfolk in 1752, to which reference has been made. It has been held, that *vigilantibus non dormientibus jura subveniunt*; and although no one ought to become *locupletior aliena jactura*, yet in *damno vitando* every one is entitled to avail himself of the blunders of those whose interests are opposed to his. However clear and honest the intentions of parties may have been, yet, if the writings used are liable to objection in point of form or solemnity, and still more, if, as in this case, they are defective in the substantial parts, they are in a competition held as inoperative and null. In the case of a second security upon lands, even though the prior security has been excepted in the clause of warrandice, the apparently postponed creditor may, on the bankruptcy of the common debtor, plead any objection to the prior security that appears from the face of the writings. So, after a competition has begun, a party conscious of a defect in his own right may, by any lawful means, but always without the aid of the bankrupt, direct or indirect, correct the defect *pendente lite*, so as to be preferred to his adversary, although formerly in a better situation than himself. On looking into the books of authority and the decisions of the Court, to be found under the titles of Competition, Execution, and Writ, it will be seen that the most minute and critical objections, in point of external formality, or arising from the want of proper and technical words in the instrument, have been sustained. In such circumstances, and notwithstanding the most satisfactory evidence of intention to give a right, the existence of another deed, followed with infestment, before the former one has been completed, must create an undoubted preference.

“These observations are not disputed in the general case.

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1885.

It is the first regular infestment in real estate,—the first act of delivery in the transfer of moveables,—and the assignation or conveyance first intimated, in personal rights, that is preferred ; although before any of these forms have been gone through, an obligation to dispoise, or to make delivery, or to give a valid assignation, can be shewn. Particularly in recorded real rights, if appearing in the appropriate register, unless fraud can be proved, the entry in the record is the only evidence that can be depended upon ; without this, a form calculated to give security to creditors and purchasers, would become a snare to them.

“ It is, indeed, in one particular case only, that an attempt has been, of late, made to break through the otherwise universal rule, and that is, in the case of adjudications of lands ; as to which it has been contended, that if the debtor has previously, and *bona fide* engaged to make a conveyance of the subjects adjudged, this should be held sufficient, without any actual transference in the ordinary forms of law, to warrant a judgment in favour of the party having such imperfect right ; and this, although the same right had been in the most formal manner attached by adjudication far beyond its value. And this principle, if admitted at all, would be sufficient to set aside a judicial sale under the bankrupt statutes, if resting only on adjudications, or so far as adjudications have been ranked on the price of the lands sold. The decree of sale would not give an effectual title to the lands, unless the infestment upon it had been followed with uninterrupted possession during the prescriptive period of forty years.

“ The recent decisions upon this subject have been fully argued upon, and explained by Lord Corehouse. But, at a more early period, there are authorities, it is humbly thought, not less conclusive. Thus, in the case of base rights prior to the establishment of the registers for publication, a later conveyance or adjudication, if followed by possession, was preferred to the former ones, although clearly importing an obligation to make an effectual transmission of the right. And so, in the case of personal rights of lands, he who obtains the first infestment, will be preferred. In these cases, although before possession has followed in the one case, or infestment in the other, the party so situated may have become acquainted with the



conveyance prior in date, still he will be preferred ; and it would be singular if the result were different. In the case of a prior conveyance being followed by one of a later date, and this again accompanied by an adjudication of the same date, obtained by a separate creditor, the second conveyance, if followed by the first infetment, would be preferred to the prior one ; while, according to the argument maintained for the defenders, the first conveyance would be preferred to the decree of adjudication, although entitled to rank *pari passu* with the second conveyance.

“ In the same manner, an adjudger, who had gained an easy victory over a creditor or purchaser, with a blundered infetment, will after all be obliged to yield to another creditor or purchaser who, like the defenders, has, as to nine-tenths of the lands, no warrant at all.

“ It is not easy to discover the grounds of such a distinction as has been suggested. Our ancient apprisings were truly judicial sales of lands, subject to redemption within a certain period. And although these were followed by adjudications, which, by authority of special enactments, are to be ranked *pari passu*, if within a year of the first effectual one, and are in some other respects different from apprisings, the two rights are in general of the same nature, and attended with the same effects ; and there is no authority, either expressed or implied, for deciding that a decree of adjudication, prior or of equal date, should be postponed to an obligation to convey, however correct in point of form, if not followed with infetment.”

Professor (now Baron) Hume, in his lectures on the title of adjudication, gives a statement of the decisions upon the point now at issue. Referring to the case of *Duncan v. Wylie*, 7th December 1803, he says, that the estate of a bankrupt being sequestrated, the right of the trustee, as adjudger for the creditors in general, was not affected by a latent and private deed granted by the bankrupt. This judgment, he observes, altered the interlocutor of the Lord Ordinary, which proceeded upon the old rule, and was meant to be established for the rule in all such cases as should afterwards occur. He adds, that even when the law was otherwise understood, if a person who was infet should dispoine, and the dispoinee should allow his right

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1885.

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1885.

to remain personal, without taking infestment, and if the creditors of the disponent should adjudge the subject, and be previously infest, their right would not be liable to be qualified by the personal right of the disponent. And he refers to the case of *Mitchell v. Fergusson*, 13th February 1781.

Lord Balgray.

LORD BALGRAY observed,—“ Upon a most careful and attentive perusal of the whole facts detailed in the record, it does not appear that fraud can be laid to the charge of the common debtor, neither can any fault be imputed to the lender or his agents. It is perfectly clear to me, that a proper and prescriptive progress of titles was submitted to consideration, sufficient to satisfy any conveyancer, and which could not be discovered as defective, without a topographical examination which never hitherto has been held as the duty of any professional man. What therefore has taken place, must be viewed as having proceeded from inadvertency or mistake. This no doubt creates an obligation against the common debtor to apply the proper correction,—but this extends no further than the parties immediately concerned. Creditors certainly cannot benefit themselves by fraud, but being *certantes de damno vitando*, they have been always considered to be entitled to take advantage of errors and mistakes, to the effect of obtaining a fair and equal distribution of their debtor's effects.”

Lord Fullerton.

LORD FULLERTON observed,—“ Considering the circumstances of this case; in particular, that the special security was not only stipulated for, but that all parties seem to have acted under the impression, that it was actually granted at the date of the advance, I think it would be exceedingly difficult to distinguish, upon any reasonable principle, between the present and that numerous class of cases, respecting *nova debita*, in which the Court have sustained the securities. But I do not think it necessary to enter into that inquiry here. The deeds under reduction were granted, not merely after or within sixty days of bankruptcy, but after sequestration, and after the statutory confirmation and adjudication in favour of the trustee. Such being the case, and concurring as I do entirely in the preceding opinion, both on the subject of the inefficacy of the alleged personal obligation or constructive fraud in limiting, or in any way qualifying the right of the bankrupt to the pre-

judice of his creditors, and on the effect of the various provisions of the 54 Geo. III. c. 137, I agree in the general result, that the deeds challenged in this case ought to be reduced."

In the Opinion returned by LORD PRESIDENT HOPE and LORD MONCREIFF, their Lordships observed,—“ But a second part of this case remains for consideration. The bond of corroboration having been granted after sequestration, it is maintained, that the estate had passed by the adjudication to the trustee, though he had not got a feudal title, and that the bankrupt was disabled by the bankruptcy from doing any voluntary act.

“ Here the principle of the Act 1696 must be laid aside. That Act applied equally to deeds after bankruptcy, and within sixty days preceding it, plainly supposing that a bankrupt might at common law grant effectual deeds after notour bankruptcy. Now, here he has granted a deed, on which infestment has passed, which infestment must be effectual, unless the trustee can reduce it. But it cannot now be said that it is a deed in security of a prior debt ; if it were, it would be under the Act 1696. It must therefore bear another character.

“ It is the case, then, of a deed granted for the purpose of doing that which the defender's constituent believed, and had a right to believe, was done at the moment when he advanced his money in the year 1823. It is in implement of a *bona fide* stipulation, intrinsic of the contract, which the defender was misled to believe was implemented at the first. It was not so implemented, by the fault of the bankrupt, whereby Mr. Walker and his agents were directly deceived.

“ Here the question arises, whether it is to be held that this was done by the fraud of the bankrupt ; and it is a very serious question. Mr. Stewart was bound to know the titles by which he held the property which he offered as a security ; the more especially, as he ventured to act as his own agent. But he deliberately sends to the defenders' agents a special description, expressly held out as the description of all the lands, on the estimate of which the security had been agreed to be taken ; and then he sends a charter, containing the same description *verbatim*, as the guide to the agents in making out the bond. But the terms of that title are such, that no ordinary care could have discovered that it did not comprehend the whole

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.

1835.

Lord President  
Hope and Lord  
Moncreiff.

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1885.

lands, as composing the lands of Hillside. The deed is made out and deliberately revised, and afterwards signed by him ; and he accepts of a loan of £10,000, on a security believed to comprehend lands valued at £21,000, when, in fact, it comprehended lands only worth about £1000. On the other hand, it appears that he had, a few years before, put his name to deeds in favour of his brother and sisters, in which the distinction of the titles was clearly marked.

“ It would be with great reluctance, that we should draw the inference that, when all this took place, Mr. Stewart had it present to his mind, that the lands were held by separate titles, and that he deliberately intended to deceive Mr. Walker and his agents. We know that there may be unaccountable forgetfulness, and great haste and rashness under difficulties. But we apprehend, that there is such a thing as fraud in the eye of law, where not only a criminal purpose could not be shewn, but persons of fair and liberal minds, from knowledge of the individual, may be convinced that no such purpose could exist. That Mr. Walker and his agents were in point of fact deceived, can admit of no doubt. That they were naturally, if not necessarily deceived, by the course which the negotiation took, and the positive acts of the borrower, seems to us to be equally clear. We were at first under an impression that all the title-deeds, both of Hillside and of all the other lands, had been sent to Mr. Gordon. But, on an accurate examination of the record, and of the charter therein referred to, it is quite clear that it is not so, as already explained, and whether it was by design or error on the part of Mr. Stewart that the proper titles were not sent, it still operated as directly to deceive Mr. Gordon as if it were proved to have been done by positive intention.

“ We are therefore constrained to come to the conclusion, that, without necessity of holding that there was a directly fraudulent purpose, there were acts sufficient to constitute, as to this question, a fraud in the eye of law. Mr. Stewart's readiness to grant the bond of corroboration may tend to impress the belief, that he had great regret for the unjust effect which his inconsideration at least had produced. But any agent who had done the same thing, however pure he might feel himself from any purpose to mislead, must have answered for it as for

a legal fraud. In one word, if this was merely an error, it was an error of such a kind, that, in a question like this, it must stand in the same place with a direct fraud.

“When the state of the security actually given was discovered, no one can doubt that there was an obligation on Mr. Stewart to do whatever he could to correct it. If it had been discovered at an earlier period, the defenders would certainly have had a good action to compel him to execute an additional deed, such as that which he did execute; and he could not have resisted it, without rendering the case a very clear one of positive fraud. Whatever view, therefore, may be taken of the bond of corroboration, we have no idea that Mr. Stewart did anything wrong in granting it. On the contrary, we think that he was bound to grant it, *valeat quantum*, and to do all that he could for the relief of the defenders. Whether he could do it effectually is a different question.

“A mistake sometimes enters into such discussions, as if it were impossible that the situation of a creditor could be at all altered or improved after sequestration. But in various particulars the law is settled otherwise. A creditor by heritable bond, not infeft, is entitled to take his infeftment after sequestration; and if he obtains it before the trustee is infeft, his preference is secure. In Cormack’s case, the infeftment was not taken till after sequestration; and, what is more, it was done by the voluntary act of the bankrupt in delivering the deed. And until the last Bankrupt Act, which made the act of sequestration equivalent to an intimated assignation, the holder of an unintimated assignment could run a race with the trustee for the first intimation. Still farther, there is a series of cases establishing this point, that where the bankrupt granter of a disposition, on which sasine may or may not have passed, has not been himself infeft, and where the trustee holding the titles avoids infesting him, that he may not validate the security, though the trustee may try to get a title throwing the bankrupt out of the progress, the creditor is entitled to run the race with him; and if he gets adjudication and infeftment first, he will be secure. This is clearly implied in the case of *Mitchell v. Fergusson*, 13th February 1781, though the trustee, having the first infeftment, was preferred. It is implied also in the case

STEWART’S  
TRUSTEE  
v.  
WALKER’S  
TRUSTEES.  
1885

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1835.

of *Smith v. Taylor*, 18th December 1795, even holding that the decision was wrong, the trustee having got the first infestment : and it is implied in the case of *Buchan v. Farquharson*, May 24, 1797. The only doubt was, whether it was competent to the trustee to exclude the creditor, by getting the first completed right.

“ This may not resolve the present question. It only goes thus far, that all things are not closed by the act of sequestration, and that a preference, not previously established, may be made out after it. We know that it is a rule, established on sound principle and abundant authority, that, after bankruptcy, the bankrupt cannot give aid to one creditor to complete a preference by diligence which he could not otherwise have completed. But neither does this solve the present question. There may be exceptions even to that rule. But the present case appears to us to stand on different grounds. The power of disposing the lands remained in Mr. Stewart. Even the trustee took his posterior title from him by disposition. The question therefore is, Whether the bond of corroboration can be reduced, not as proceeding a *non habente potestatem*, but as a fraud, in respect that he was bound to dispoise to the trustee ? Was it, then, a fraud in Mr. Stewart to dispoise to the defenders, in corroboration of his previous deed ; and can the creditors maintain this reduction on the ground of such a fraud committed ?

“ On the best consideration that we can give to the case, we think that it cannot be so treated. It is not necessary to revert to a principle, at one time held in the law, that all adjudgers must take the right of their debtor, *tantum et tale*, as it stood in his person. That principle, no doubt, has been greatly modified. But it has not yet been held, in any case that we are aware of, that an adjudger is in all respects in the same situation with an onerous purchaser. On the contrary, there is an important distinction still firmly established, viz., That, wherever there is fraud, either actual or legally constructive, though an onerous purchaser would be safe, an adjudger cannot take benefit by such fraud.

“ This point of distinction is precisely explained by Mr. Bell, in a special section, as an existing principle of the law. And

he delivers the essential proposition in these words :—‘ Against creditors, fraud has been thought entitled to full effect, where it is of that kind which lawyers have distinguished as originating the contract, *dans causam contractui*. In all such cases, creditors, in taking the benefit of the property, are considered as adopting the fraud of the bankrupt, by which he acquired the property ;’—a principle, clearly comprehending the case of his keeping the property free of a conveyance or security, which, but for the fraud, would have affected it. Mr. Bell confirms the statement by many authorities ; and particularly by reference to the opinion of Lord Braxfield, in the case of Thomson *v.* Armstrong’s Creditors, November 16, 1786, which, indeed, though its authority might be doubtful on any other ground, was plainly a sound and right decision on this principle. It was stated as the case of a conveyance to an agent, with powers to sell, and to apply the proceeds for the granter’s behoof. The dispositive made up a title by charter and sasine, leaving out the qualification ; he granted an heritable bond to one of his own creditors, and others of them adjudged. The Court held the statement to be an averment of intrinsic fraud, and found, ‘ that the allegation of fraud is not relevant against the heritable creditors, but found that it is competent against adjudgers.’

“ But we apprehend, that, in order to reach this point, it is not necessary that there should be a case established of criminal intention to commit a fraud. We do not see that that was required in the case of Thomson and Armstrong, or in any of the other cases. But the much later case of Gordon *v.* Cheyne, February 5, 1824, if it did not sanction the more general doctrine, that creditors, as adjudgers, take the rights of the bankrupt *tanta et talia*, can stand on no other principle than that, without any positive intention to commit a fraud, it would have been a fraud in the bankrupt or his creditors to take advantage of the form in which the right stood. Indeed, the principle is expressly laid down in the interlocutor of the Court,—‘ In respect the petitioner, as trustee for general creditors, who are neither purchasers nor special assignees, adhere to the Lord Ordinary’s interlocutor.’

“ Many other authorities could be referred to on this point. It depends on a principle, which we imagine must be funda-

STEWART’S  
TRUSTEE  
v.  
WALKER’S  
TRUSTEES.  
1885.

STEWART'S  
TRUSTEES  
v.  
WALKER'S  
TRUSTEES.  
1835.

mental in all law, that justice shall be done between the parties in competition. Here the defenders and the other lenders gave their money on the faith of a specific security. Mr. Stewart either believed that he had given it, or there was an intentional fraud. There is no creditor who can say that he contracted with Mr. Stewart on the faith of the records, and that the lands were free ; for there was no attempt to make another security in a different form : that would be a very different case. And the plain question is, Whether creditors, who followed solely the personal credit of Mr. Stewart, are entitled to take advantage of that which, whether intentional or not, was a legal fraud, whereby his titles continued disencumbered, so as to hold the money of the defenders in the common stock, while they keep the security on the faith of which it was given ? We humbly think that there is principle enough in the law of Scotland to determine this in favour of the defenders ; and that we trench on no point, either of the feudal or of the bankrupt law, in holding that the deed, which was in itself validly executed by Mr. Stewart, cannot be reduced by his creditors adjudgers to any such effect.

“ The question is, Whether creditors can reduce the deed of the bankrupt, made to give effect to the true contract and the actual understanding, on the ground that it was a fraud against them for him to grant it ? It was by a fraud (whether actual or constructive, signifies not) that the right was not made perfect at first ; and, if the creditors were to succeed in reducing the deed, they must take benefit by the fraud, which the bankrupt has endeavoured to correct. We are of opinion, that this they are not entitled to do. For we can entertain no doubt, that, taking the facts of the case as importing a legal fraud, it was a fraud *dans causam contractui* ; inasmuch as Mr. Stewart, soliciting the loan upon the tender of the special security of the whole lands in Dr. Coventry's valuation, laid the basis of the whole contract on the fulfilment of that tender : without it there would have been no loan. There was no loan, except on the faith that the pledge had been fulfilled.

“ There is a specialty in the case, however, which ought not to be left out of sight. It appears from the third article of the condescendence, that there were six parcels of lands, in which



Mr. Stewart was not infeft, but which he held by personal right. But whatever may be said with regard to lands possessed by feudal title, we have always understood, that, in personal rights, creditors must be affected by the obligations of the bankrupt specially applicable to the lands. In the case of Thomson and Armstrong's Creditors, for instance, there would have been no question at all if the bankrupt had not been infeft; for the conveyance being substantially a trust, that quality would have affected all creditors; and numberless other illustrations might be given. In the present case the contract is so specific for a security over all these lands, that although, whether through fraud or error, it was not granted, it must be held that the bankrupt, continuing to possess the lands by personal title, held them subject to a trust for the benefit of the defenders to the extent of their debt; and the creditors cannot take these lands without being subject to that trust obligation which was in Mr. Stewart's person. In every view, therefore, we are of opinion, that, even though the Court should not sustain the defence generally, the case of these lands, held by personal title, ought to be separately disposed of."

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1885.

At the advising of the cause, LORD JUSTICE-CLERK BOYLE observed,—“If, then, neither the Statute 1621 nor the Statute 1696 apply, on what other ground can these deeds be challenged or set aside? and that brings us to the second question, Whether, under the Bankrupt Statute, or at common law, this is a security which is reducible, and from which no fruits or any profit can flow to the party in whose favour it is granted? Now I beg to say, that notwithstanding all the ability evinced in the opinions signed by the majority of the consulted Judges, I cannot get over the difficulty, that where there is no interference with the principle that regulates the security of the records, we cannot, and have no right to give our sanction to a doctrine that would shake to their foundation the rights of those who have transacted with an individual *bona fide*. It is not compatible with my views of the law regarding the security of the records, that either under the Bankrupt Statute, or upon any principle of common law, a personal creditor, who is not protected by the records, can take advantage of the fraud or

Lord Justice-  
Clerk Boyle.

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1835.

*culpa lata* of the common debtor ; and although it has been said, that under the act of sequestration the trustee (which means the creditors for whom he acts) takes the estate free from those obstacles that would oppose themselves in the person of the common debtor, and that the principle of *tantum et tale* does not apply to such a case, I must say, that that is not made out to my satisfaction ; and that it appears to me, from the decisions, it can be shewn, that when there is no interference with the security of the records, and that there was *culpa lata*, or gross fraud, the creditors are not entitled to found upon it. If, under the adjudication in favour of the trustee, a title is made up, and infestment previously taken upon it, that comes precisely within the right the party has to vindicate his preference founded upon the records. But so long as the right stands under an adjudication, not made heritable, and not entering the records, I apprehend that the trustee or creditors cannot take benefit from the fraud of that party whose act is brought in question. Wherever a party is secured by infestment, that will be effectual ; but I do not think that, where no infestment has been completed, the adjudication can compete with the established right or the infestment of another party.

“ My Lords, in regard to what is stated, both in the cases for the parties, and in the opinions of some of the consulted Judges, as to the effect of certain decisions which are said not to be authoritative, and to have been subsequently superseded, I apprehend that such observations must be taken with great qualification ; and particularly, in regard to the *dictum* in the report of the case of Ross of Kerse, as to the case of Thomson, it appears to me that it did not take into view the whole circumstances of Thomson's case. For, on looking into the case, and keeping in remembrance the fact, that Lord Braxfield was on the Bench when it was decided, it struck me as a remarkable circumstance, that if it had been supposed the Court meant to say that the law laid down in Thomson's case was fundamentally wrong, Lord Braxfield, who was in his vigour at the time, and who was present at that decision, should not have disapproved of it ;—to me, my Lords, it is inconceivable that he would have stultified himself by saying the judgment in the case of Thomson was erroneous in point of law.

“ I must say, therefore, as to these *obiter dicta*, which are founded on as setting aside the whole doctrine of *tantum et tale*, in reference to adjudications, that they rest on a very slender foundation.

“ In the case of Mitchell, the Court gave effect to the plea of the adjudger infest, and I think that was quite right.

“ But I pray your Lordships to attend to that case of Thomson, where the Court found, as their judgment expressly bears, that while the allegation of fraud was not relevant against heritable securities and infestments, it was relevant as to the creditors adjudgers. If you look to the report of the case, and what is there stated, as observed on the Bench, it is plain that the Court were not trying or deciding the question of all cases of adjudications, even when infestment followed. So far from that, the judgment traces the distinction between those infest on heritable securities and adjudgers not infest. And, accordingly, there occurs this passage in the opinion of the Court,—‘The adjudging creditors stand, however, in a different predicament ; for, as it had been found by decisions, which, for the stability of the law, ought not to be departed from, they must take the right of their debtor *tantum et tale*, as it was in his person.’ Nothing can be more explicit or decisive.

“ We have been referred to an opinion, said to have been expressed in the case of Ross of Kerse, in these terms :—‘And it was observed, that what had given occasion to so ample a discussion was an opinion expressed on the Bench in the case Thomson against Douglas, Heron, and Company,’ that ‘adjudging creditors stand in a different predicament from disponees, as they must take the right of the debtor *tantum et tale*, as it is in his person, (Fac. Coll. Nov. 15, 1786,) an opinion now stated to have been erroneous.’

“ Now I beg to say, that although this professes to state what passed on the Bench in the case of Thomson, when Lord Braxfield was one of the Judges, it does not state the distinction, as referred to in that former report between heritable creditors infest and adjudgers ; and I must think that the remark in this case of Ross is in itself erroneous. The decision in the case of Ross turned upon a totally different principle, and did not interfere with that of Thomson. In the same way,

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.

1835.

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEE  
1835.

in the case of Wylie, it is said the Court returned to the correct view, where it was decided that a *pactum de retrovendendo*, contained in a back-bond, was merely personal, and not effectual against creditors.

“ But we have a much later authority in the case of Gordon v. Cheyne, decided in 1824, where it was found, as stated in the rubric, that in a latent trust the claim of the truster is preferable to that of the creditors of the trustee under a sequestration. This decision was pronounced by the First Division in 1824. My Lords, looking to the opinions in that case, and the judgment, so far from thinking from what is there stated, that the law in the case of Thomson was wrong, I think it is conclusive of the contrary, the Court having there used almost the very same words in their judgment. And really, from that last judgment on the point, I cannot find that there is anything to raise a doubt in regard to the general rules of law and justice applicable to the present case ; for I ask, on what ground could that decision be right, if an adjudication, which has not been perfected by an infetment entered on the records, can put the trustee in a better situation, or give him a better right than that of the person from whom he has adjudged ? As to the views and *dicta* thrown out in these cases that I have before referred to, I see some of them noticed by Mr. Bell ; but I must deny that there is any principle in them to which I can assent.

“ To maintain that, by a process of adjudication, you are to place a party in a better situation than him whose right is adjudged, is a proposition in which I say there is no solidity whatever. It is contrary to every idea of justice that I have been taught, and I think it would be dangerous for your Lordships to throw out even a doubt that would interfere with this judgment in the case of Gordon. There the Court were of opinion, ‘ that the principle of the case of Redfearn applied exclusively to the case of purchasers founding on an intimated assignation, and could not be extended to a general body of creditors under a sequestration, and that the authority of that decision was not affected by the subsequent decision in the case of Macombie. The general body of creditors could only take the rights *tantum et tale*, as they stood in the person of the

bankrupt.' That is the embodied opinion of the Court in that case, and I hold it to settle the point.

"Is there any one of your Lordships who can for a moment entertain a doubt, that if Mr. Stewart had continued solvent, and master of his own property, and having full power over it; that he, on this defect in the security being discovered, could not instantly have been compelled to complete a sufficient one to these defenders, in conformity with the admitted covenant of parties? I apprehend that no one could entertain for an instant a contrary opinion. It would have been impossible to throw the burden upon the agents of the borrower, or to say that they were to suffer. He must have been bound himself to complete that security, which he had covenanted and engaged to give. But if that was the situation in which the matter stood before his bankruptcy, are these parties, the pursuers, under the Bankrupt Statute, entitled to say, that while they take that which he had at the time, yet, having done nothing to perfect their right by infestment, the bond of corroboration must be reduced, leaving the defenders the security over the five acres, while they, the creditors, take possession of the ninety acres? I cannot acquiesce in such a proposition. If there had been other heritable creditors infest in these ninety acres before the defenders, that would have been a different question, and a matter which we could not have touched. But that is not the case here. There are no persons saying that they have a right under infestment to these ninety acres. We have merely the personal creditors founding on the adjudication to the trustee not completed by infestment, and I conceive, that upon every principle of common law, as well as of equity, the securities in favour of the defenders are effectual.

"If, therefore, your Lordships of this Division were in a capacity to pronounce a judgment, which we, however, are not, the opinion of the majority of the Judges being against that view, I should have submitted to your Lordships, that you should pronounce a judgment on the special grounds I have stated, finding, in fact, that as the pursuer, for behoof of the personal creditors of Mr. Stewart, is not, under the circumstances of the case, entitled to reap any fruits from this action, it is unnecessary to decern in the conclusions of reduction. For I

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1835.

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1885.

cannot consider it as consistent with the principles of eternal justice, that, in a case where no man can entertain a doubt of what was *actum et tractatum*, when the securities were stipulated for, and meant and believed to have been given, any person, coming in right of the borrower, can take advantage of his *culpa lata*."

Lord Glenlee.

LORD GLENLEE observed,—“ But the creditors say that the right here was granted after sequestration. Still they must, nevertheless, stand in the same situation in which they were before it was granted. No doubt Mr. Stewart could do nothing to better the right of the defenders ; but if they could, in respect of their prior right, have opposed the trustee, had he been adjudging the lands, then the trustee would have no interest to reduce the bond of corroboration. Then on this, on the whole, I agree with your Lordship in the views you have expressed. It appears to me that there is a mistake on both sides, and particularly on the part of the pursuer, as to the true nature of the doctrine of *tantum et tale*. It is argued as if, in the case of Thomson, it had been held that the general creditors were in the situation of having incurred a passive title, and that it could meet extrinsic claims. I am persuaded that there was no idea of that in the minds of the Judges at the time. The principle seems to be this, that where the objection attaches to and affects the title of the bankrupt, where it actually corrupts and taints his own title, although it is not to be listened to in a question with a completed infestment, yet in regard to questions with the general creditors taking the bankrupt's right as it stood in his person, it may affect them, although the qualification does not enter the record. In that view, I see nothing against the doctrine.

“ In the case of Ross of Kerse, there was no allegation of the title of the bankrupt, whose right was adjudged, in itself being bad. But it was said, that if he granted such and such a bond, he would incur an irritancy. The answer made was, that it is not a cause of absolute vitiosity in his title—it is merely a cause for setting aside the right on separate and extraneous grounds.

“ In the same way, in the case of Wylie v. Duncan, there was no vitiosity alleged in the bankrupt's title. The bankrupt held the right just as was intended, and had merely given a personal

back-bond, which could not be good against creditors, although the doctrine of *tantum et tale* were admitted. It is said these are all departures from the doctrine laid down in Thomson's case ; but they are not so, unless that case be misunderstood, so as to hold it laying down that the personal creditors are liable to every claim whatever against the bankrupt, which it never meant to do ; and I think the objection to the doctrine of *tantum et tale* has been misapplied here by the trustee. As to how far this case can be assimilated to that of Thomson, it is a different question. The character of the facts in Thomson's case seems to me not to be very different from the present—the facts of which are undeniable, although their character be viewed differently by the different Judges. Some of them think that Mr. Stewart was only under an obligation to grant the security ; but that is not, in my mind, the correct view. He had not only promised to give, but actually represented himself as having given, the security, and, by his own conduct, led these creditors to believe that they had got right to the whole ninety-five acres under their original bond. That was the true state of the case ; that, by his own act and deed, this limited and vitious title was given, but firmly relied on by the lenders, as having been effectual over the whole of the lands. I agree in the opinion, that, *ab initio*, there was no *machinatio* to deceive ; but the question is, Whether, by his tortuous act, he misrepresented what was done, and led the lender to believe he had got the security ? As to this I have no doubt at all.

“ Supposing, in Thomson's case, all had been adjudgers, I do not see it would have made any difference. The opinions there go merely on the fact of an omission of the trustee to insert the clause qualifying his right in the charter of resignation. Now, in that view, where is the great difference between that and the present ? Why, really, I think, in principle at least, they seem very nearly connected. I doubt if there was held there to have been any *machinatio* to deceive *ab initio*, but it was considered enough to say that the title sought to be adjudged was tortuously held, and contrary to what the true state ought to have been.

“ In regard to the act of sequestration, I am not aware that it is to be understood as giving any supereminent right to the

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1835

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1885.

trustee, to what would have arisen from an ordinary adjudication by creditors. Then if there had been no sequestration at all here, but merely adjudgers, would the authority and principle of Thomson's case not apply? If an adjudication only had been raised, that moment the creditor in this bond would have become alarmed, and found out what had happened, that they had not got the full security; they would have opposed the adjudication, and decree would only have been pronounced, reserving objections *contra executionem*, and then the creditor in the bond would have been heard, and would have prevailed, although, if he had taken no steps, and allowed the adjudgers to be infest before him, he would have been excluded. If infestment had followed in favour of the trustee here, the case would have been altered. But when there is no such infestment, is this act of adjudication to run a muck against all creditors? Is it reasonable to say that the act of sequestration is to take away what, but for the sequestration, these defenders would have got?

"The 29th section of the Statute bears, in explicit terms, that the adjudication shall convey every right, title, and interest, which was formerly in the bankrupt, to be now in the trustee; and at the close of the section, it is expressly declared, that if the bankrupt's title happens to be entailed, or otherwise of a limited nature, the conveyance to be executed by him, or the decree of adjudication obtained by the trustee, shall only be understood to carry that right and interest in the estate which the bankrupt himself has, and no farther. This is very like a reservation of all objections to an adjudication *contra executionem*, and, of course, reserving the creditors' claims of preference. I cannot conceive the Statute to give a stronger effect. In the case of *Wauchope v. Duke of Roxburgh's Trustees*, certain lands were not specially included in Duke John's trust-deed, and Duke William took them up. His creditors were leading adjudications, when Wauchope raised an action, claiming them as Duke John's lands, and objecting to the adjudications; decree was given, reserving all objections *contra executionem*. Afterwards Wauchope succeeded in his claim. Now, suppose these facts to have occurred in the case of a trader, would a sequestration have at once extinguished Wauchope's



interest, claiming as Duke John's trustee? I rather think not. On the whole matter I concur in the opinion just delivered, that the reduction should be dismissed, on the ground that there is no sufficient interest in the trustee.

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1835.

"I forgot to notice one point, viz., the difference between the lands in which Mr. Stewart was infest, and those in which he was not infest, in regard to which last the objection founded on the doctrine of *tantum et tale* applies very strongly."

LORD CRINGLETIE observed,—“I confess that I agree with Lord Cringletie. the majority of the Judges who have given us their opinions. I cannot see how this act and deed of Mr. Stewart can give the smallest preference to the defenders. Whether they have any preference *aliunde* is another question. Suppose the trustee had got himself infest before the infestment of these other parties, he would have been successful beyond all doubt. But if so, I do not see that what Mr. Stewart did after his bankruptcy can have the least effect in depriving the trustee of his preference. I think the Bankrupt Act is express upon this point, and declares, in *totidem verbis*, that a bankrupt cannot do a single act after his bankruptcy to affect his general creditors. His hands are tied up, and the estate is carried to the trustee by the act of sequestration, beyond the control or power of the bankrupt. The trustee here obtained a special adjudication, and he was certainly entitled to go on and get himself infest. In a competition among creditors, every one is entitled to ameliorate his condition if he can; but this must be done without any assistance from the bankrupt. An adjudger is entitled to the benefit of litigiousity, which inhibits the debtor from doing any deed to prejudice the right of the adjudger to complete his right, if he do so without such delay as the law considers to place him in *mora*. At common law, therefore, independent of the Bankrupt Statute, the pursuer was entitled to infest himself on his adjudication, and could not be prevented nor prejudged by any voluntary act of Mr. Stewart. But how was he defeated? Why, by these other parties proceeding contrary, as I apprehend, to the common principles of litigiousity and of law. From the moment the sequestration was awarded, all Mr. Stewart's writings and title-deeds fell by law to be under the charge of the trustee, for behoof of the creditors at large.

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1835.

But what takes place here? Mr. Gordon, the agent for the defenders, obtains wrongous access to them, passes an infetment in favour of Mr. Stewart, and prevails on him to grant the deed under reduction. It is quite clear, that if there is any foundation for the claim of preference of the defenders, such claim must rest on grounds quite independent of the security given by Mr. Stewart after bankruptcy, which must be set aside. It will be observed, that another creditor (a person of the name of Brown) advanced to Mr. Stewart money on precisely the same security with Walker, while he should have got the same sort of security as was expected by Walker. Now, would it not be highly absurd and unjust, if Mr. Stewart could, by any deed after sequestration, prefer the one of them to the other, when both were in *pari casu* in lending their money, and stipulating for security?

"If there be anything like a separate right in the person of the defenders, what is to hinder them from claiming under the sequestration? If they have such right, they will get the benefit of it there; but if they have not, I have no notion that they can get it through the deed of Mr. Stewart.

"I think there was considerable negligence on the part of these creditors, the defenders; for when they saw that the description of the lands did not comprehend all that was contained in Dr. Coventry's valuation, they should have asked the question at Mr. Stewart how this had happened; and if the question had been asked, I suppose he would have answered it at once. Then, again, a search of encumbrances was furnished, which might have shewn them the mistake. We have not seen that search. What does it contain? Is it limited to Hillside proper, or what lands does it embrace? Stewart may have been much to blame, but I think there was also considerable remissness on the part of the lenders. Supposing it was owing to negligence that the deeds were not complete, what does negligence amount to more than an obligation? I think that Stewart, after the sequestration, was fettered, and could not grant such deeds.

"But what, after all, even at the most, do the circumstances constitute more than obligation to grant a deed? They go no farther. Now, suppose there had been such an obligation five

years ago by Mr. Stewart—but he does not fulfil the obligation till within sixty days of his bankruptcy—would that have done? I think it would not. Upon the whole, I agree with the majority of the Judges, that the deeds must be reduced.”

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1885.

LORD MEADOWBANK observed,—“ When the case originally came before the Court, I entertained the same opinion as Lord Cringletie ; but now my opinion has been changed, and I concur with that which has been expressed by your Lordship ; and as I have nothing to state which has not been noticed, I need not say more.”

Lord Meadowbank.

The Court Found, “ That the defender had not produced a title sufficient to exclude the action ; and reduced and decerned in terms of the libel.”

JUDGMENT.  
June 28, 1838.

The defender having appealed to the House of Lords, “ It was Ordered and Adjudged that the Appeal be dismissed, and the Interlocutor therein complained of be affirmed.”

JUDGMENT.  
House of Lords,  
April 10, 1835.

LORD BROUGHAM observed,—“ Much of the argument in this case seems to have been rested on the analogy of our equitable estates in England ; but the Scotch law holds no resemblance now with the law of England in this particular, though both systems had one common original. Our equitable titles are peculiar to our jurisprudence. An agreement to convey an estate for a valuable consideration executed is with us, to all substantial purposes, a conveyance which vests the property in the purchaser, although, to obtain his full rights, he must resort to one Court, and demean himself as a suitor according to one set of rules, and not another. Whatever is covenanted to be done is held in equity as done, so that a title by mere agreement is quite as paramount to any subsequent encumbrance, or other puisne title, as a legal conveyance.

OPINIONS.

“ This is not the law of Scotland. Upon feudal principles, the party who first perfects his title by sasine (and since the Act 1617, by registration also of his sasine) is preferred to him, who, at the prior time, may have paid his money on an agreement or obligation. Land is only affected by the Scotch and the feudal law in a certain way. Any other mode of convey-

STEWART'S  
TRUSTEE  
v.  
WALKER'S  
TRUSTEES.  
1835.

ing it, or burdening it, is as inept and as inefficient as a sale or mortgage by parole would be by us. If here a man gave his money on a parole conveyance or mortgage, he would of course be cut out by one who, the next month, got a mortgage or conveyance, or even an equitable title, by a written agreement from the same proprietor to the same lands. This might be a hardship, and it is exactly the same kind of hardship which may happen in Scotland, and which has happened here, with this only difference, that in Scotland writing may be as inefficient to affect the land as parole is here. This consideration, too, is an answer to the argument, that the trustee takes the estate of the bankrupt *tantum et tale*. He does so, and the estate was not affected in the bankrupt's hands by the personal obligations, which were sufficiently valid and binding against the bankrupt. Between the bankrupt and the trustee there can be no privity such as to affect the latter with any personal obligation incurred by the former; and the land not being affected by such obligations, the trustee taking it *tantum et tale*, takes it discharged of any real burden. As to the English law, it may be farther observed, that even we allow some farther nicety, oftentimes working great injustice to creditors. He who, *posterior tempore*, obtains a legal title to an estate covered with real securities, will, by obtaining a prior equity, defeat one who lent his money on an equitable title only between the date of the two titles that now unite in the same person; so that one who has lent his money this year may be defeated, or, as it is very expressly termed, squeezed out by one who has only advanced money on the same estate a year after.

“The rigorous administration of the feudal principles in Scotland can work no greater hardship than this; and the consideration of such topics is only important in such a case, as affecting the question of costs. I am of opinion that none should be given here or below; and with the exception, therefore, of the order of the Court of Session as to expenses, I now move your Lordships to affirm the interlocutors complained of.”

*Where the Heir of Investiture neglects a Recorded Personal Deed of Entail, and makes up a fee-simple title, neither his heritable creditors infest, nor his personal creditors adjudging, will be affected by the Entail.*

DOUGLAS v. ADJUDGING CREDITORS OF KELHEAD.

SIR WILLIAM DOUGLAS of Kelhead, in 1705, bound himself in his contract of marriage to provide the estate of Kelhead in favour of himself and the heirs-male of the marriage. Upon the procuratory contained in the contract, Sir William resigned, and was infest on a charter of resignation from the superior. In 1724 he executed a strict entail of the lands of Kelhead, which was recorded in the Register of Tailzies, but no infestment followed upon it. Upon Sir William's death his son was served heir in general to him. He was also served heir of provision under his father's contract of marriage. The personal right under the contract of marriage, which was thereby vested in him, he assigned to a trustee, by whom he was charged to enter heir to his father. Sir John having renounced, the trustee obtained a decree *cognitionis causa*, and thereafter a decree of adjudication of the estate of Kelhead in implement of the marriage-contract. This title was then conveyed by the trustee to Sir John, who, upon that title, brought a reduction of the entail 1724, on the ground that his father had no power to lay the estate of Kelhead, which had been provided to the heirs of the marriage, under the fetters of an entail. Having obtained decree in this action, he then expedite a charter upon the decree of adjudication, and was thereupon infest in fee-simple in the estate of Kelhead.

Feb. 21, 1765.

NARRATIVE.

A process of ranking and sale of the estate was thereafter brought in the lifetime of Sir John at the instance of his creditors, some of whom were heritable creditors infest, and others were personal creditors, who had adjudged. Captain Douglas, the eldest son of Sir John, objected to the sale, on the ground that his father, by serving heir to Sir William, had incurred a general representation of him, and was thereby barred from

DOUGLAS  
v.  
ADJUDGING  
CREDITORS OF  
KELHEAD.  
1765.

reducing the entail executed by him in 1724; and that he himself being a minor when the decree reducing the entail was obtained and undefended in the action, he could not be hurt by that decree, except in so far as it was well founded in law. It was answered for the creditors, that supposing the decree of reduction were taken out of the way, the setting up of the entail could not affect their debts, because the feudal right of the estate was vested in Sir John as a fee-simple without any fetters or limitations whatever; and the estate was therefore liable for the payment of every debt which was good against Sir John personally.

On December 15, 1764, the Lords sustained the defence, that the irritant and resolute clauses were not inserted in the right and infeftment on which Sir John Douglas enjoyed the estate of Kelhead. Against this interlocutor, in so far as it sustained the claim of the personal creditors of Sir John, his son reclaimed; but he acquiesced in it, in so far as it sustained the claims of the heritable creditors.

ARGUMENT  
FOR CAPTAIN  
DOUGLAS.

PLEADED FOR CAPTAIN DOUGLAS.—As to the heritable creditors, it is admitted that the defence sustained by the interlocutor is good. Sir John having been infeft in fee-simple, and the heritable creditors having contracted upon the faith of the records, they are safe. But there is a great distinction between them and the adjudging creditors, who lent their money upon personal bonds; and they therefore cannot be said to have contracted upon the faith of the records.

The sole question now at issue is,—Whether, where a party neglecting a deed of entail makes up his titles to an estate in fee-simple, the adjudication of his creditors will be effectual against the next heir of entail? In this question every one is concerned who has any personal right or claim to a land estate, whether by deed of entail, contract of marriage, or any other deeds.

Purchasers or creditors by heritable bonds are, for the benefit of commerce, secured as having contracted upon the faith of the records. But there is no law, nor any favour of commerce, that ought to give the same security to creditors lending their money upon personal bonds, and afterwards adjudging for payment of their debts.

Every creditor who attaches a subject of his debtor for payment of his debt must take it *tantum et tale* as it stood in his person, that is, burdened with every quality and condition, and liable to every ground of challenge or eviction to which it was liable in the person of the debtor. A creditor cannot be in a better condition than his debtor was ; and so any one who had any claim upon the subject attached cannot be cut out of it by the accident of its being carried off by the diligence of a creditor. This rule obtains in moveables. A debt arrested by a creditor is subject to every quality and exception to which it was liable in the person of the debtor. It is true that the subject in the present case is heritable. But the law is the same both as to heritable and moveable subjects, except where the security of the records is concerned.

DOUGLAS  
v.  
ADJUDGING  
CREDITORS OF  
KELHMAD.  
1765.

The records were introduced for the security of purchasers or creditors by heritable bonds. They can secure those only who give their money for land. This a man does where he purchases the property of an estate, or takes an heritable bond over it. But a man who gives his money upon a personal bond does not do this. He gets no more for his money than the promise of the debtor to repay it ; and his adjudication afterwards is no contract upon the faith of the records, nor any contract at all, but a thing of necessity, which he does in order to operate his payment.

As the adjudgers in the present case, therefore, cannot be in a better condition than their debtor, they cannot compete with the heir of entail ; and as they are not infeft, but have only by their adjudication a personal right to the estate, they cannot compete with him who has a prior and preferable personal right to it.

PLEADED FOR THE ADJUDGERS.—There is no foundation in law for the distinction contended for between heritable creditors infeft and personal creditors adjudging. The intention of the Records is to ascertain and publish the nature and qualities of all land rights, in order to give security to creditors and purchasers. The principle of the common law is *Resoluto jure dantis, resolvitur jure accipientis*. Upon this principle no distinction would lie between a voluntary infeftment in security of

ARGUMENT FOR  
ADJUDGERS.

DOUGLAS  
v.  
ADJUDGING  
CREDITORS OF  
KELHEAD.  
1765.

debt, and an adjudication in security and payment of debt. The former as well as the latter could only affect the estate *tantum et tale* as it was in the person of the granter. If the title, therefore, of the debtor is reduced, the subaltern conveyances, whether legal or conventional, must fall to the ground. It is from the force of Statute alone that, in so many instances, the right of the granter may be resolved, and yet the subaltern rights derived from him for just and onerous causes will subsist. Hence the security which creditors and purchasers enjoy by the establishment of the public Records. The Statute law for the security of commerce has enacted, That the nature and extent of the author's title shall only be ascertained by his infestment appearing upon the public Records.

The only title of Sir John which appeared upon record was a fee-simple title. Upon that title his creditors lent him money. Some of them were infest, others adjudged in security of their debts ; but all of them contracted with him, and trusted their money upon the faith of his infestment in the estate, as appearing from the public Records. Personal creditors contracting with an heir of entail, who has made up titles to the estate without engrossing the irritant and resolute clauses, or where the entail itself has been neglected to be recorded, may recover their debts out of the estate by the due course of legal diligence. This they may do even although the requisites which had at first been omitted should afterwards be complied with. For the law looks to the situation of the estate at the time the creditors lent their money, and holds, that a creditor lending his money to a person standing infest in an estate in fee-simple, or before the tailzie is recorded, contracts with that person upon the faith of the public Records, as much as he who lends his money to him upon an heritable bond and infestment. If the last is secured in his real right against the challenge of an after heir of entail, so also must the former be secure in the legal effect and operation of his personal debt upon an estate which stood vested in his debtor in fee-simple at the time of the contract. A contrary doctrine would lead to consequences more pernicious to the commerce and credit of the country than any that have yet been felt from the law of entails. It would indeed open a strange scene of iniquity if a father, being the



institute in an entail, should make up his title as heir of line ; and after contracting debt upon the credit of an unlimited title to the full value of the estate, and after spending it upon the improvement of the estate itself, should *tip the wink* to his eldest son when he came of age, revive the dormant tailzie, and by the sweep of a declarator of contravention, recover the estate in the person of his eldest son free and disengaged of all the debts contracted by himself.

DOUGLAS  
v.  
ADJUDGING  
CREDITORS OF  
KELHEAD.  
1765.

The case of *Baillie v. Denham* has nothing to do with the present question. The House of Peers reversed the judgment of this Court in that case upon this clear ground of law, that Sir Robert Denham's right to the estate being only a personal deed, whoever contracted with him upon the faith of that right behoved to take it with all its conditions and qualities ; and consequently with and under the irritant and resolute clauses of the entail. But in the present case Sir John was heir-apparent under the last investiture of his father, and made up a complete feudal title to the estate in his own person ; and his creditors, who lent him their money, and adjudged the estate in payment of it, did not contract with him upon the faith of his personal right to the tailzie, but upon the faith of his real right in the lands by charter and infeftment upon record, unlimited by any condition or irritancies whatsoever.

The Lords preferred the adjudgers.

JUDGMENT.  
Feb. 21, 1765.

LORD MONBODDO, in his Decisions, observes,—“ There were here two questions concerning entails not completed by infeftment. The first was, when the heir made up his titles neglecting the entail, either by service, as heir of the investiture, and infeftment thereon, or by an adjudication in the name of a trustee, as it happened in this case, together with a charter of adjudication and infeftment, and

then contracts debts upon which the creditors adjudge the estate, but do not complete their right by infeftment, the question is, Whether the next heir will not be preferable to the creditors upon this ground,—that adjudgers can only take the estate with the burthens affecting it ? There were specialties in the case, but the Lords took it up upon this general point, That no entail can be effec-

tual against a purchaser, creditor and, accordingly, they found un-  
by heritable bond, or adjudger, animously that the adjudgers  
unless completed by infeftment, in this case were preferable."—  
which they thought was the sense *Brown's Supplement*, vol. v. p.  
of the Act of Parliament 1685; 907.

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*Where the Heir of Investiture neglects a Recorded Personal Deed of Entail, and makes up no title to the Estate, but possesses on apparency, his creditors, whether real or personal, may charge him to enter heir to his predecessor, and then adjudge the Estate.*

I.—STEWART v. DOUGLAS.

Feb. 21, 1765. **NARRATIVE.** SIR WILLIAM DOUGLAS of Kelhead entailed the lands of Cumbertrees in 1727. The entail was recorded, but no infeftment followed upon it. His son Sir John succeeded and possessed the lands on apparency. During his possession on apparency he borrowed from Mr. Stewart the sum of £7000 sterling, for which he granted two heritable bonds, upon which Mr. Stewart was infeft. Mr. Stewart having charged Sir William to enter heir in special to his father, he brought an action of ranking and sale of the lands. Sir John's eldest son opposed the sale in respect of the entail.

**ARGUMENT FOR PURSUER.**

**PLEADED FOR THE PURSUER.**—The entail founded upon is a personal deed. Sir William Douglas stood vest and seized in the lands as an absolute and unlimited fiar. If Sir John had made up his titles as heir of the investiture, his debts must have been effectual against the lands notwithstanding of the entail. An entail, so long as it remains a personal deed, is neither better nor worse from being recorded. If the party has no other right to the lands than the entail, its conditions and provisions must necessarily qualify the right, and must of consequence be effectual against both creditors and purchasers. They can never reach the estate except through the entail, and every person contracting upon the faith of a personal right, must be

presumed to know the nature of that right without having recourse to any register.

But where the party has a separate title to the estate, the entail, whether recorded or not, can have no effect if infestment has not followed. When one person contracts with another in possession of an estate, goes to the Register of Sasines and finds that the estate stands vested in his person in fee-simple, or that it stood vested as such in the person of his predecessor, to whom he is apparent heir, the party is unquestionably in *optima fide* to contract with him as an unlimited proprietor. He is not bound to inquire whether he stands fettered by a personal deed of entail. Creditors contracting with the heir of an investiture in fee-simple are not presumed to know, and are not bound to pay any regard to any personal right which the heir may have to the lands. They are entitled to avail themselves of that right in the heir which is most beneficial to them, which must appear upon the face of the investitures upon record, and upon the faith of which alone the law presumes they did contract.

The pursuer having charged Sir John to enter heir in special to his father, and having obtained an adjudication against him, that adjudication established the same right over the lands adjudged which he would have had if Sir John had served himself heir of the investiture, and thereafter disposed the lands to the pursuer in security of the debt for which the adjudication was led. This being the case, it is impossible that a personal deed of entail can be set up to defeat the pursuer's right. The unlimited right which, notwithstanding of the personal deed of entail, remained in *hereditate jacente* of Sir William, became vested in the pursuer by his adjudication, subject to the legal reversion. The heirs of entail, consequently, can never carry more by the tailzie than the legal reversion of his adjudication.

The pursuer is in the same position in which a purchaser from Sir John would have been. If a purchaser, in order to complete his title, had charged Sir John to enter heir in special to his father, and had then adjudged in implement, he would have thereby a clear and preferable right to the estate. In that case none of the heirs of entail could pretend to compete with the purchaser upon a personal deed upon which no infest-

STEWART  
v.  
DOUGLAS.  
1765.

STEWART  
v.  
DOUGLAS.  

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1765.

ment had followed. The same result must follow in the present case. Creditors have the same right to attach the estate for their debts that a purchaser has to attach it in implement of a minute of sale. The only difference is, that in the one case there is a legal reversion competent to the debtor to redeem the lands for payment of the debt, whereas in the other case the adjudication gives an irredeemable right to the lands.

ARGUMENT FOR  
HEIR OF ENTAIL.

PLEADED FOR THE HEIR OF ENTAIL.—Sir John had not two titles of apparenancy in his person, the one as heir-apparent of the investiture, and the other as heir of entail. He had only one right to the lands, namely, his right as institute of the entail. He had no occasion to make up titles by service to this right. He had merely to execute the procuratory of resignation granted by the entailer, expedite a charter and infeft himself. The proper diligence to have been used by his creditors was to have adjudged from him the lands directly, without any charge, for they would have thereby carried the procuratory of resignation that he had right to. This, however, would not have served their purpose, because they must then have taken the estate liable to all the conditions of the entail. They have, therefore, charged Sir John to enter as heir of the investiture, neglecting the entail, and have thereupon adjudged. The question therefore is, Whether by this device they can convert the limited fee which was in the person of their debtor into a fee-simple affectable by their debts?

The charge to enter heir of the investiture was incompetent and improper, as it charged Sir John to do a thing which by law he could not do. Although Sir John might *de facto* have served himself heir of the investiture, and so taken up the lands in fee-simple, yet it would have been a tortuous and illegal act. The service could have been stopped by any of the heirs of entail, and after it was passed it might have been reduced. It cannot therefore be maintained that Sir John's being charged to enter heir of the investiture was in construction of law the same thing as if he had entered. It would have been the same thing if he could have lawfully entered as heir of the investiture, but he could not. And although he might voluntarily have done so illegal a thing to frustrate his father's settlement,

it does not follow that his creditor can compel him by a charge to do so.

STEWART  
v.  
DOUGLAS.

1765.

JUDGMENT.  
Feb. 21, 1765.

The Lords preferred Mr. Stewart.

On this branch of the case of the ranking and sale of Kelhead, LORD MONBODDO in his Decisions observes,—“ The second question was altogether abstract without any specialties; and it related to the case where the heir of the personal deed of entail, and who also was the heir of the investiture, as in the former case, possessed the estate without making up any titles. The creditors charged him to enter heir in special of the investiture, and then adjudged the estate; and the Lords found unanimously, like-

wise upon the words of the Statute 1685, that the creditors were preferable to the next substitute. N.B. The debtor in this case was the first institute of the entail, so that he had no occasion to make up his titles by service, but only to execute the procuratory of resignation. Nevertheless the Lords seemed to think that his title of possession was rather as apparent-heir of the investiture than as institute of the entail, and therefore that the creditors were in *bona fide* to contract with him.”—*Brown's Supplement*, vol. v. p. 907.

## II.—PIERSE v. ROSS.

In 1766 Hugh Ross of Kerse executed a strict entail of the estate of Kerse in favour of his eldest son and the heirs whatsoever of his body. The entail was recorded, but no infeftment followed upon it. The entailer died in 1767, and was succeeded by his eldest son, who expedite a general service as heir of line, but made up no title upon the entail. In 1786 he granted an heritable bond to the pursuer, Mr. Pierse. Upon the personal obligation contained in this bond, Mr. Pierse in 1786 obtained a decree of adjudication against Mr. Ross, as lawfully charged to enter heir in special to his father. Having obtained infeftment a judicial sale took place. He then brought a reduction of the entail, on the ground that as it had never been

Jan. 31, 1792.  
NARRATIVE.

PIERCE  
v.  
ROSS.

completed by charter and infeftment, it could not be founded on in bar of the pursuer's diligence.

1792.  
ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—No infeftment ever passed on the entail, and the present heir being heir to his predecessor in the feudal right has been charged to enter heir to him, and adjudication has been led against him in that character. This puts the present heir in the same position as if, neglecting the entail, he had connected himself by special service with the party last infeft. The pursuer has adjudged the right so vested in him, the purpose of a special charge being to supply the omission of a service. The *hæreditas jacens* of the ancestor is thus carried by the pursuer, and the personal right of the present heir in possession under the entail is thereby superseded. The present heir is not in the same position as a stranger heir would have been, who having no other title but the entail, must connect himself with it. The present heir has two separate titles, one under the feudal right as apparent heir, and another under the personal right under the entail. If the pursuer had been obliged to connect himself with the personal right, he must have taken it with all the qualities attending it. But as he is able to connect himself with the feudal right, he is entitled to say that he has contracted upon the faith of the records, as the feudal right was unqualified, and so it was found by the Court in the case of Sir William Douglas of Kelhead in 1765.

ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—The father of the present heir had a right to dispose of his estate, and having executed a strict entail, which is recorded in the Register of Tailzies, the same must be effectual unless cut off by prescription. The conveyance was directly in favour of his son, the present heir, which consequently gave him an immediate personal right without the necessity of a service. Since his father's death he has possessed the estate, and it cannot be said that he neglected the entail, although he did not immediately proceed to complete the feudal right under it. Had he proceeded to make up his titles by special service, leaving out the tailzie, he would have been guilty of an act of contravention, and subjected him-

self to an immediate forfeiture, as well as to the annulling of his title so made up. But he did not contravene, and therefore it was unnecessary to declare any irritancy against him, and the tailzie being on record, no creditor giving him personal credit was entitled to plead ignorance of the nature of his right. The effect of a special charge in order to adjudge the feudal right, is merely in point of form to supply the want of complete titles, but not to give the heir a better right to his estate than that which truly belonged to him under his whole titles. The pursuer must either have thought that the heir in possession had no right at all in him to the estate, and therefore he has not contracted with him upon the faith of it, or he must have known what the nature of his right really was.

PIERCE  
v.  
ROSS.  
1792.

LORD SWINTON, Ordinary, reported the cause to the Court.

At the first advising LORD JUSTICE-CLERK MACQUEEN observed,—“ In the case of Cumbertrees, where Sir John had made up no titles, Court was clear that the tailzie was no bar. Creditors had charged him to enter in special as heir of investiture. This right was independent of his personal right under entail. Just so in this case. Mr. Ross is not only disponee and vested with a personal right under tailzie, but is also the heir *alioqui successurus*. In that character his creditors have made up his titles for him, and they take the estate from him as unlimited fiar. The case is quite different where the owner has no title to the estate but the tailzie. In that case though the tailzie is personal, it is quite good against creditors by the common law of Scotland. That is a point quite at rest. In short, I conceive that in terms of the Act 1685, infestment is absolutely requisite to validate the entail in the person of one *alioqui successurus*.”

OPINIONS.  
First Advising,  
Nov. 30, 1791.  
MS. Notes,  
Baron Hume's  
Session Papers.

LORD PRESIDENT CAMPBELL observed,—“ This is an important point to the law of tailzies, for it goes to cut down every tailzie not completed by infestment by the maker. In one case, viz., where the heir is a stranger, this is clearly not the rule. The personal tailzie is good against all the world, as found by the House of Lords in the case of Denham of Westshiells, on

PIERCE  
v.  
Ross.  
1792.

just principles. Now, why should it be otherwise where the disponent is heir-at-law? He has no feudal title on record to give his creditors that plea. His right is personal. If they inquire, they find a personal tailzie on record. If they charge, and he make up titles as unlimited fiar, then he incurs an irritancy, and the creditors are excluded. Now if he does not comply, why should the creditors be in a better situation than if he had completed?"

Interlocutor  
of Court,  
Nov. 30, 1791.

The Lords ordered a hearing in presence.

OPINIONS.  
Second Ad-  
vising,  
Jan. 31, 1792.  
MS. Notes,  
Elphinstone's  
Session Papers.  
Also,  
MS. Notes,  
Baron Hume's  
Session Papers.

At the second advising LORD JUSTICE-CLERK MACQUEEN observed,—“ I wrote the memorial in the case of Kelhead now in the hands of the Court, reprinted, and not one portion in that memorial but in my opinion is founded on the feudal law of Scotland. In order to secure a land-estate by an entail against creditors and purchasers, two things are requisite. *First*, The entail must be recorded; and, *second*, It must be rendered real by infeftment. The first of these particulars is required by Statute; the second is part of the common law of Scotland. Before the Statute 1685, it was held by this Court that entails were good though not recorded, and this idea, which had for some time prevailed, was corrected by the Statute 1685. Cases may occur where an entail will have effect though not recorded, and even while it remains a personal deed. Where a person has no other right to an estate but by an entail, his creditors cannot attach that estate for the debts of such an heir, for this reason, that they cannot get at the estate but through the entail, by which alone their debtor has right to the estate, and in such a case they must take the estate with the restrictions and limitations imposed by the entail, though it remains personal, as it is by means of it only that their debtor can pretend right to the estate. But if the debtor is not only the heir under the entail, but is also the nearest lawful heir that would have succeeded independently of the entail, his creditors, if the entail remains a personal deed without infeftment, will get at the estate.

“ I hold it to be a clear proposition in the law of Scotland, that nothing can be an effectual encumbrance upon a land



estate but what enters the infeftment. Where an entail remains personal, and the heir of entail is the son or heir-at-law of the entailer, on the death of the entailer the creditors of the entailer or the heir are entitled to charge the heir to enter to his predecessor, and to take up the estate as in *hæreditate jacente* of the predecessor, and having done so, the creditors may proceed and adjudge the estate. There is a great distinction between voluntary conveyances and legal diligence of creditors. When a person takes a voluntary conveyance, the law presumes that he will take care that he will not accept of a conveyance but from a person having a good right, and the fair presumption is, that to be satisfied of this he has searched the records, and among others the Register of Tailzies, and if he there find an entail on record, though no infeftment upon it, he would be in *mala fide* to accept of a conveyance from the heir of entail. But where a creditor has lent money, he is in law and in justice entitled to take every lawful means to secure his payment, and therefore though a creditor should discover that his debtor was heir in an entail that had been recorded, but upon which infeftment had not been taken, the creditor is in *bona fide* to disregard this personal deed of entail, and proceed to attach his debtor's estate by means of a charge to enter heir to his predecessor, and to adjudge, and by doing so he will take the estate free from the fetters of a personal deed of entail. I am therefore clear that in this case the estate was attachable for the debts of Mr. Ross, who was not only heir of entail, but the nearest and lawful heir of the former proprietor, as the entail had not been rendered real by infeftment."

LORD HENDERLAND.—"The principles laid down by Lord Justice-Clerk are undoubtedly founded on the feudal law of Scotland. If heirs of entail are to be considered as creditors under the entail, the Act 1685 requires that to make their right in the character of creditors effectual they should do diligence, and if they do not, they can have no claim as creditors under the entail, and as heirs they cannot take but under the burden of debts where the entail remains personal."

LORD DREGHORN.—"Ever since the decision in the case of Kelhead, I have been clearly of the opinion delivered by Lord

PINER  
v.  
ROSS.  
1792.

PIERSE  
v.  
ROSS.  
1792.

Justice-Clerk. The same principles were held to be well founded in the case of *Mitchell v. Fergusson*, 13th February 1781, collected in the Faculty Decisions. A creditor adjudger infest is just in the case of a second disponent, who is infest before a first disponent, in which case the second disponent first infest must be preferred."

LORD PRESIDENT CAMPBELL.—" I believe the doubts I threw out when this case was first moved was the cause of this hearing. My difficulties arose chiefly from the decision in the case of *Douglas, Heron, and Company v. Thomson*, 15th November 1786, where it was held that adjudging creditors take the estate *tantum et tale* as it stood in their debtor ; and I find the same doubts entertained in the case of *Mitchell v. Fergusson*, in July 1781 ; but there, upon a hearing, it was found that creditors could not be hurt by personal deeds ; and I think the principle of that decision determines the present question. I am now satisfied that my doubts were not well founded ; and I am clearly of the opinion given."

LORD ESKGROVE.—" This Court formerly held that a personal conveyance divested the proprietor ; but the decision in the case of *Bell of Blackethouse* set that to rights, when it was found that a second disponent, who obtained the first infestment, was preferable to a prior disponent not infest ; and upon the footing of that decision I am clear in the present case, in so far as relates to adjudgers infest. But if no prior infestment by the creditors adjudgers, I see nothing at this day to hinder the heirs of entail to make up titles and take infestment under the entail ; and they would then be preferable to adjudgers not infest. An apparent heir may continue his predecessor's possession, though a personal right in a disponent. This satisfies me, that a personal deed of entail does not divest the heir of his right of apparenay ; and if so, the creditors of the heir are entitled to take every right in the heir ; and in this case I am clear that creditors who have charged the heir, adjudged, and are infest, must be preferred."

LORD MONBODDO.—" The Statute 1685 is the rule for judging of entails. That Act requires the irritant, &c., clauses to be engrossed in the infestment ; and as that is not done here, this is not an effectual entail against creditors. The entail here

contains no clause obliging the heir to possess on that title only. The heir might have made up titles as heir not upon the entail ; and I doubt, if he had done so, whether, in this case, a substitute heir could have prevailed in an action of contravention. As the heir could have made up titles disregarding the entail, I am clear that creditors could charge him to do so. I have no doubt that the sale is good, and that the letters must be found orderly proceeded."

PIERCE  
v.  
ROSS.  
1792.

The Court decerned in favour of the pursuer.

JUDGMENT.  
Jan. 81, 1792.

1. On the Session Papers LORD PRESIDENT CAMPBELL has written,—“The doctrine of the pursuer goes to this, that every proprietor who entails his estate must see that his entail is complete by charter and sasine in his own lifetime ; otherwise, if he leaves it a personal deed, and if his heir owes debt, the creditor will lay hold of it, by charging him to enter, and adjudging the *hæreditas jacens*, even although the heir himself should have no intention to disappoint it, if he be the heir *alioqui successurus* under the feudal investiture ; for perhaps the creditors may take this step before he is aware, so as to complete his right under the tailzie, and he may thereby incur a forfeiture without intending any wrong. If the heir of the investiture actually makes up a title in fee-simple, and grants an heritable bond and infeftment, or disposes the estate to an onerous purchaser, this will be good ; because such creditor or purchaser contracts with him upon the faith of the record ; and there is no

remedy but an action of damages to the heir of tailzie against the granter. Nay, even if, without completing a title in his own person, he should grant such a disposition or heritable bond, obliging him to make up titles, it is thought that the receiver of the right may proceed by special charge and adjudication in implement ; and if he is so lucky as to get the start by obtaining infeftment before the heirs of entail are on their guard to denude the *hæreditas jacens*, he may be entitled to maintain the same plea of preference as a *bona fide* contractor upon the faith of the records. But the question still remains, Whether a mere personal creditor, who did not contract with him upon the faith of any record, or of any estate, but upon his personal credit alone, and perhaps even before there was the pretence of a succession having opened to him, can, by special charge, and by leading a common adjudication for debt, secure a preference upon the *hæreditas jacens* of an estate, the succession of

which, perhaps, is devised under a strict entail, or the property, perhaps, conveyed to another, leaving nothing but a nominal fee in *hereditate* of the ancestor, which cannot fairly be taken up by the heir of the investiture for any other purpose but to make the deed of the ancestor effectual?

2. "A good deal seems to depend upon the question, Whether a personal creditor adjudging the estate, or supposed estate, of his debtor, can take it in any other way than *tantum et tale*, subject to all conditions and encumbrances, even those of a personal nature, such as a latent entail affecting it in the person of the debtor? The decisions upon this point have not been carefully reported. The case of Countess of Caithness *v.* Earl of Rosebery, 8th November 1744, Kilkerran, p. 384, does not explicitly determine the point. The case, however, of Mitchell *v.* Fergusson, 13th July 1781, seems to have been decided on general grounds in favour of the adjudger. The case of Thomson *v.* Douglas, Heron, and Company, 15th November 1786, takes it for granted that the decisions have been against the adjudger; but the argument is too shortly reported, and the decisions not referred to; and it is believed the opinion there given is erroneous. The leading decision with respect to the general doctrine in the case of feudal rights is that of Bell *v.* Blackethouse, Remarkable Decisions, 22d June 1739.

3. "Another point material to be considered is, whether the per-

sonal creditors of an apparent heir can be said to have dealt with him upon the faith of the record more than the creditor of one who has a mere personal right to an estate; in which last case it seems to be fixed, since the decision of the House of Lords in the case of Denham of Westshiells, that the creditor is affected even by an unregistered tailzie. See case of Carleton, Kilkerran, p. 546. If the personal creditor of one who has a personal right to lands cannot be held to have contracted upon the faith of the record, the question is, Whether the personal creditor of one who has no right at all, except that of apparency, is in a better situation? In the present case the pursuer endeavours to lay aside the personal right which was in Mr. Ross by his father's entail, and to connect with him only as apparent heir in the same way as if the entail was not in his favour, but in favour of some other party. Mr. Pierse, who has an heritable bond, may perhaps be entitled to do so, and to adjudge in implement, if he can get the start of the heir of entail, who has likewise a right by legal steps to make the entail effectual; but it seems difficult to maintain that his personal creditors, who did not stipulate any security, should be entitled to take to themselves a better security than he could lawfully give them, by attaching an estate which never was in his person by any feudal right at all, and to which he cannot make up a title in fee-simple without committing an unlawful act.

and subjecting himself in damages.

4. "Yet it must be acknowledged, that in the case of *STEWART v. DOUGLAS* of Kelhead, in 1765, the Court decided in favour of the adjudging creditors in circumstances very similar to the present; and perhaps it may be better to adhere to the rule so established than to go backward and forward upon a question of such importance. The doctrine of *tantum et tale* is sometimes misapplied. See cases of *Buchan v. Farquharson*, 24th May 1797, and *Taylor v. Smith*. Upon the whole, the decision pronounced by the Court in this case seems to be well founded on feudal principles, and agreeable to former precedents."—*MS. Notes, Sir Ilay Campbell's Session Papers*.

5. One of the points raised in the case of the *CREDITORS* of *AUCHENDACHY v. GRANT*, January 31, 1792, was the same as that in the case of *PIERSE v. ROSS*. A judgment in both cases was delivered at the same time. On the Session Papers of the former of these cases Mr. Elphinston has written,—“At the time this petition came to be moved in Court there occurred a question very similar to what is agitated in this petition between the creditors and the purchasers of the estate of Mr. Ross of Kerse, where, as in this case, the purchasers had suspended

on an alleged defect of title. The estate of Kerse had been judicially sold for debts; and there the purchasers contended, as in this case, that they were not in safety to pay the price, as there was an entail, which made it doubtful how far Mr. Ross, whose debts had been the foundation of the sale, could be held as having such a right as that his debts could affect the estate, so as to give the purchaser a good title. The respondent expressed some doubts, and a hearing in presence was ordered upon the case of Kerse, and this case of Kincaigie; and this petition was superseded till that hearing should take place. In the question as to Kerse, there were no papers, but short cases stating the fact, which was very similar to the circumstances of Kincaigie; but it being mentioned by some of the Judges that the point in dispute had been very fully argued in a question that took place in 1765 between the creditors and the heir of Douglas of Kelhead, the Court ordered the memorials that had been given into the Court in the case of Kelhead to be reprinted and put in the boxes, which was done; and afterwards the cases of Kerse and Kincaigie were argued in presence, and the opinions of the Judges upon the point of law delivered after the hearing were as under noted.”—*MS. Notes, Elphinston's Session Papers*.

*The Creditor of an Heir of Entail, who has no title to the estate independently of the Entail, cannot attach the estate if the Entail remains personal, nor will the circumstance of the Entail not being recorded avail the Creditor.*

BAILLIE v. DENHAM.

**JUNE 5, 1783.** IN 1711 Sir William Denham entailed the estate of West-shiells upon the heirs of his body ; whom failing, upon Robert Baillie, and the heirs-male of his body ; whom failing, upon Archibald Stewart, the defender. Sir William died without issue in 1712. Robert Baillie then served to him as heir of provision, and thereby obtained right to the unexecuted procuratory ; but he never completed his title to the estate ; nor was the entail recorded. Sir Robert was not the heir of line of the entailer, his mother, the sister of Sir William, being still alive.

**NARRATIVE.**

In his retour he did not engross the prohibitory, resolute, and irritant clauses. In consequence of this omission, the *defender* brought a declarator of irritancy against Sir Robert ; and the action, in consequence of Sir Robert's death, was transferred against his sons. In this action the defender was successful, and the estate consequently devolved upon him. The pursuer, Mr. Baillie, a creditor of Sir Robert Denham, then brought an action against the defender for payment of his debt. The defender resisted, on the ground that the entail had never been feudalized in the person of Sir Robert, and that his creditors were therefore bound by the conditions and limitations which it contained.

**ARGUMENT FOR  
PURSUER.**

PLEADED FOR THE PURSUER.—Entails are valid or effectual, according as they are agreeable or disconform to the rule laid down in the Statute 1685. That Statute regulates entails, personal as well as real. One of the rules laid down by that Statute is, that entails shall be recorded. As, therefore, the entail in question was not recorded at the time Sir Robert contracted debt to the pursuer, the entail is ineffectual against the pursuer. It is true that a creditor is presumed to know the condition of

his debtor. But since the Statute 1685, a creditor who, upon searching the Register of Tailzies, finds no tailzie of his debtor's estate, is secure against all prohibitory, irritant, and resolute clauses. Although, therefore, he sees his debtor's infestment, or his personal right to the estate qualified and limited in the strongest manner, yet he lends his money safely, and under the protection of the law. The clauses in his debtor's right are void and ineffectual against him. He trusts to the law, and in so doing he is secure.

At the time of contracting debt to the pursuer, Sir Robert was legally possessed of, and entitled to the estate of West-shiells. The general service expedite by Sir Robert established a good right in him to the estate, and there were no restriction or limitations expressed or referred to in the retour of his service. There was no publication also of the prohibitive, irritant, and resolute clauses contained in the deed of entail. Whatever sums of money, therefore, were lent to Sir Robert must be presumed to have been lent on the faith that the estate possessed by him was liable for the payment of his debts.

BAILLIE  
v.  
DENHAM.  
1733.

PLEADED FOR THE DEFENDER.—Every estate, real or personal, which stands without any limitation or condition in the debtor, must be subject to his debts, and affectable by diligence deduced for securing or recovering payment. If, however, the right in the person of the debtor is limited or conditional, so that the limitations or conditions affect and qualify the right, whether the right be real or personal, the debts of the party thus affected cannot overreach or get the better of these limitations, and his creditors can attach the right only as it stood in the debtor's person. This was the law in real rights before the Act 1685 concerning entails.

ARGUMENT FOR  
DEFENDER.

A personal right in the person of a debtor cannot be farther affected by his creditor than so far as the interest of the debtor extended, subject to all the conditions and limitations that qualified his right. This is the case, whether these are engrossed in the deed itself, or depended upon a declaration or back-bond. If an estate is given to one in trust, under back-bond to denude when required in favour of another, the disposition, though still standing in the form of a personal right, may

BAILLIE  
v.  
DENHAM.  
1788.

be affected by the creditor of the disponent. But on the disponent interposing with his back-bond, he will recover the estate to the disappointment of the disponent's creditors, because the seeming right in him was limited by the back-bond; and he had no permanent or absolute right in him of which the diligence of his creditors could lay hold. What takes place in the case of a disposition qualified by a back-bond, holds also as to a personal right, although relating to real estates, qualified by any prohibitory, resolute, and irritant conditions, so long as such rights continued personal.

If a creditor contract with a man who has no more than a personal right, clogged with irritant and resolute clauses, he neither contracts *bona fide*, nor upon the faith of the record. But as he must necessarily see the personal right itself, or otherwise contract on no faith at all, so he must likewise see under what conditions that personal right stands. The case is different where an heir of entail is infeft upon the tailzie without repeating the irritant and resolute clauses, or where he has a separate title in him different from the entail, upon which a creditor may rely. This may happen where the heir of a new entail is likewise the heir of line, or heir of the investiture. If the heir of entail be infeft upon the entail without inserting the conditions of the entail, that infeftment will be a sufficient foundation upon which a creditor may *bona fide* contract. In such a case the creditor need not look farther back, because the heir has in him a formal right upon record, clogged with no restrictions. In the same manner, where the heir of tailzie is likewise heir of the former investiture, and is either infeft as such, or possesses the lands on apparence, a creditor may contract with him *bona fide* without being obliged to notice the entail. But where the heir of entail has, as in the present case, no form of right in him appearing not to be clogged, no right upon record, on which a creditor can rely, but only a personal disposition under the strictest irritancies, which the creditor must see, the case is quite different. He must then necessarily see that the heir of entail has no power to burden the estate.

The fact of the entail not being recorded does not render it ineffectual against creditors. If the entail had been completed



by infestment, that circumstance would have been fatal to the entail ; but where the entail remains personal, it is of no moment whether it is recorded or not. Where the entail is not completed by infestment, the right is not real. There is nothing which the creditors can attach but a conditional personal right, which is *ipso facto* resolved by the existence of the resolutive condition. When again entails become real by infestment, they cease to be affectable by personal obligations, and become upon record the estate of the party in possession. But in addition to the requisite of infestment, the Statute has superadded the necessity of recording the entail. It is to entails made real by infestment that the Statute alone applies ; and it does not extend to personal conveyances, concerning which it was never doubted, that by the common law the conditions contained in them would have full force without the assistance of any infestment or registration.

BAILLIE  
r.  
DENHAM.  
1783.

The Lords Found " That the said estate of Westshiells is still affectable by the pursuer as creditor of the said Robert Baillie, *alias* Denham."

JUDGMENT.  
Nov. 23, 1781.

The Court thereafter decerned against the defender "*tanquam cognitionis causa et declaratorie tantum*, to the effect, the pursuer may have all manner of action and execution by adjudication or otherways, for payment of the sum libelled out of and against the lands and estate of Westshiells, which pertained to the deceased Sir William Denham."

Nov. 27, 1781.

The defender having appealed to the House of Lords, it was Ordered and Adjudged " That the said interlocutor of the 23d November 1781, whereby the Lords of Session found ' that the estate of Westshiells is still affectable by the pursuer, as creditor to the deceased Robert Baillie, *alias* Denham ;' as also the said subsequent interlocutors complained of be, and the same are, hereby reversed."

JUDGMENT.  
House of Lords,  
June 5, 1783.

II.—CARLETON'S CREDITORS *v.* GORDON.

Nov. 21, 1753. In 1684 James Gordon executed an entail of the estate of Carleton in favour of the heirs-male of his own body ; whom failing, to John Gordon, third son to Gordon of Earlston ; whom failing, to Nathaniel Gordon of Gordonston, and their respective heirs-male ; whom failing, to his own heirs-male whatsoever. The entail was in the form of a procuratory of resignation, and by the prohibitory clause the heirs called were prohibited from contracting debts, or doing any other deeds, directly or indirectly, above the half of the value of the estate.

NARRATIVE.

The first substitute predeceased the maker of the entail, and both died without male issue. In 1702 Nathaniel Gordon, the second substitute, made up his title to the procuratory as heir-male and provision to the maker of the entail, but he took no infeftment, and the entail was never recorded. In the marriage-contract of his son Alexander, he, in the character of absolute proprietor, conveyed to his son the estate of Carleton, under burden of his own debts, but the son was never infeft.

The father and son having contracted debts above the value of the estate, a process of ranking and sale was brought by their creditors. William Gordon, a remote heir under the general substitution, appeared and objected that the sale could not proceed, because, according to the prohibitory clause in the entail, the debts could not be sustained above the half of the value of the estate.

ARGUMENT FOR  
CREDITORS.

PLEADED FOR THE CREDITORS.—The entail was never recorded, and so could not bind creditors. The creditors of Alexander the son are farther secured by the Act 1685, as it appoints the provisions and irritant clauses to be repeated in the rights and conveyances of the heir of tailzie, otherwise not be militate against creditors.

ARGUMENT FOR  
HEIR OF ENTAIL.

PLEADED FOR THE HEIR OF ENTAIL.—Creditors who contract with a person not infeft, do so upon his personal faith, and not upon the faith of the records. Every right, therefore, however latent, which affects a debtor, must also affect his creditors.

This principle answers all the objections, whether of the whole creditors in general or of Alexander's creditors in particular, and does so without distinction, whether the entail was made before or after the Act 1685. That Act, it is obvious, has no reference to a case like the present, seeing that it provides for the security of such creditors only who have contracted *bona fide* with a person infeft. Upon this principle, in the case of the creditors of Westshiells, where the entail was not recorded, and where the heir had made up his titles to the procuratory by a general service, without repeating the irritant clauses in the retour, the House of Lords reversed the interlocutor of this Court, and found that creditors contracting with such heir not infeft were barred by the entail.

CARLETON'S  
CREDITORS  
v.  
GORDON.  
1753.

The Lords Found "That the heir in possession might law- fully contract debts to the extent of half of the value of the estate."

JUDGMENT.  
Nov. 21, 1753.

1. LORD KAMES, in reporting the case of CARLETON'S CREDITORS v. GORDON, observes,—“ This judgment was pronounced without any debate, upon the authority of former judgments of the same kind, and of a judgment of the House of Peers. I cannot justify in my own mind this opinion. I admit that the case comes not under the Act 1685, but must be governed by the common law. Farther, I admit that clauses qualifying a personal right, or qualifying the possessor's right, must be good against a purchaser, whether voluntary or judicial; because a purchaser cannot take more than what is in the disponent. But prohibitory and irritant clauses have no such effect as to qualify

the proprietor's right, whether infeft or not infeft. It appears to me evident, that by the common law an entail is not good against creditors, even where the heir of entail is infeft: because a prohibitory clause does not limit the heir's right of property, but is only a personal prohibition, the contravention of which can go no farther than to subject him to damages, or perhaps to forfeiture. Now, if the possessor's right of property be not limited, every adjudication adduced against the estate for his debt must be effectual. This reasoning is equally applicable to the case of a person who possesses by a disposition without infeftment.”

2. In reporting the same case

LORD KILKERRAN observes,—“The entail had never been registered in the Register of Tailzies, but then neither had infestment ever followed upon it, and therefore as the creditors could not plead that they had contracted on the faith of the records with a person infest, or who was apparent heir of a person infest, it was understood that they could not object to their being barred by every clause in the tailzie, as if it had been recorded in the Register of Tailzies, and as if their debtors had been infest, and the irritant clauses insert in their infestment, as was adjudged by the House of Peers in the question between Mr. James Baillie and Mr. Archibald Stewart *alias* Denham of Westshiells. Neither was this point controverted by the Creditors, nor is it likely the Lords would have hearkened to them if it had, in respect of the said judgment of the House of Peers. The Court of Session had in that case found that even the prohibitory and irritant clauses in a personal right were not effectual against creditors when not recorded in the Register of Tailzies, on this ground, that the Statute 1685 was a total settlement of the whole system of entails; and they appear to have thought, that as where, upon a disposition of tailzie, a sasine had been taken, containing the several irritant clauses, and registered in the Register of Sasines, it was nevertheless not effectual against creditors unless recorded in the Register of Tailzies, so the reason was the same in the case of per-

sonal rights upon the construction of the Statute 1685; but the House of Peers put a more limited construction on the Statute as only concerning tailzies upon which infestment had followed.”—*Kilkeran's Decisions*, p. 546.

3. In the case of *BOYD v. MACHARG*, March 4, 1766, Alexander Boyd of Pinkhill executed in 1761 a strict entail of his estate in favour of his son in liferent, and Thomas Boyd, his grandson, in fee; whom failing, to his grandson's nearest heir-male whatsoever; whom failing, to his own heirs-male whatsoever. The entail was never recorded; but in virtue of the procuratory contained in the entail, a charter was obtained in 1673 from the superior, the Earl of Cassills. No infestment was taken upon this charter till 1752. Thomas Boyd, the institute, made up no feudal title to the estate that held of Earl of Cassills. On his death without issue, his cousin, Alexander Boyd, grandson of the entailer by a second son, succeeded. He also made up no title, and died leaving female issue only. Upon his death his nephew, Alexander Boyd, succeeded. He also made up no title, but possessed the estate for many years as heir-apparent under the entail. Towards the end of his life he granted tacks of almost the whole estate, of long endurances. Upon his death Robert Boyd, the nearest heir-male to the institute, succeeded, who took infestment in 1752 upon the unexecuted precept contained in the charter granted by the Earl of Cassills in

1673. He brought an action to reduce the leases granted by Alexander, his immediate predecessor. In defence the defender PLEADED,—The entail not having been recorded in the Register of Entails, it was ineffectual against the onerous contracts of any of the heirs of entail. And as Alexander Boyd possessed the estate as apparent heir under the personal right, the pursuer cannot pass him over without implementing his onerous contracts.

4. The pursuer PLEADED,—The granter of the leases in question was not the heir-of-line of the entailer, his immediate predecessor having left female descendants. Where a person has no title to lands but by a personal deed, his right, from the nature of the thing, must be limited by the qualities of that deed, and every person who contracts with him is liable to be affected with every quality or condition that limits his right. Creditors have no pretence for trusting a man upon the property of an estate in which he is not infeft. The Act 1685, requiring registration of entails, does not apply to such a case. It applies to those creditors only who contract, *bona fide*, with a person infeft in the estate. Personal titles continue upon the footing of the common law, according to which every deed must be affected by the qualities inserted in *gremio* of the granter's right, where no absolute right of property appears to be in the granter from the records. In these personal deeds it is not necessary that the limitation should

appear in any record. It is sufficient that the limitations are insert in the only title from which it can appear that the granter has any right to the lands. The limitations in that right must necessarily affect his creditors. If Alexander Boyd had been heir-of-line to the entailer, who stood infeft in fee-simple under the old investiture, the defence might have prevailed, but as in point of fact he was not heir-of-line of the entailer, there are no *termini habiles* for the defence. He had no title of possession, either by apparency or otherwise, but upon the entail. As therefore that entail continues personal, it must necessarily limit the right of a party who had no other title to the lands but the entail.

5. The Court sustained the tacks sought to be reduced, in respect that it did not appear that tacks granted contrary to the prohibitions of the entail were expressly irritated, but only the debts. Apart from this *ratio*, however, the Court were unanimous that the conditions of the entail affected the creditors of the heir. LORD MONBODDO in his Report, under date January 22, 1776, observes,—“ In this case Lord Pitfour gave his opinion, and it was the unanimous opinion of the Court, that, if an heir of tailzie possesses without the tailzie ever having been completed by infeftment, and is not the heir of the investiture, his right upon this personal deed of entail will be affected by all the qualities and conditions of the entail. This, he

said, was decided in the last resort in the case of Denham of West-shiells, upon this ground,—that no creditor or purchaser can say that he deals with such an heir upon the faith of the records; and a personal right to lands, like every other personal right, is affected by every quality or condition, though not appearing upon record. In short, neither the records nor the Act of Parliament 1685 have anything to do with personal rights to lands; but if the heir of tailzie in this case had been likewise the heir of investiture, he might have been charged to enter as heir of the investiture, and upon that ground the lands might have been adjudged." And, again, under date March 4, 1766, his Lordship observes,—“ This case was before the Court 22d January last, and this day the Lords adhered. Lords Pitfour and Coalston gave it as their opinion that a personal right to lands was affectable by every personal obligation relative to the lands; yet, if it was intended that the proprietor should be debarred from alienating or contracting debts, it must be done in the form of prohibitory, irritant, and resolute clauses; because, although the Act of Parliament 1685 does not relate to such personal rights to lands, yet, by the common law, before that Act was made, a proprietor could not be restrained from the free use of his property except in that form, and it would be unjust that a man's debts should not affect his estate, and yet that

he should be allowed to enjoy it. The only difference, therefore, in this matter betwixt a personal and a real right to lands is, that where the right is real, there must be two registrations, both of the tailzie and of the sasine, whereas in the case of a personal right there is no occasion for any recording at all.”—*Brown's Supp.*, vol. v. pp. 919, 922.

5. In the case of *CARLETON'S CREDITORS v. GORDON*, the attempt to attach the entailed estate was made in the lifetime of the debtor. In the case, however, of *BAILLIE v. DENHAM*, the attempt was made after the debtor's death. This difference in the position of the debtor gives rise to a plea which appears not to have been urged in the case of *Baillie v. Denham*, that the creditors of the deceased heir could not make good their debts against his successor under the Act 1695, cap. 24. That Act forms the only medium by which the debts of an heir possessing on apparency can be made good against an estate so possessed, but the estate can be attached by the creditors of the heir who possessed upon apparency for three years only to the same extent as it could be attached by the creditors of the succeeding heir. This point was raised and determined in the case of *GRAHAM v. GRAHAM'S CREDITORS*, May 13, 1795, and *DICKSON v. SYME*, February 24, 1801. See *infra*, *Passive Representation*.

*Where a Party is not Heir of Investiture, but has right to an Estate under two Personal titles, the one free and the other fettered, and he possesses without completing either title, obligations incurred by him cannot be made good against the Estate after his death.*

## CHISHOLM v. M'DONALD.

A PORTION of the estate of Chisholm called Kirkton-Comar Feb. 27, 1800.  
held of the family of Lovat; the rest held of the Crown. In NARRATIVE. 1715 the whole was forfeited, and was sold in 1724 by the Commissioners of Inquiry to James Baillie. In the same year Baillie conveyed it to George Mackenzie by a disposition, containing an assignation to the unexecuted procuratory contained in the disposition from the Commissioners of Inquiry to Baillie. Upon this procuratory Mackenzie obtained from the Crown a charter of the *whole* estate. In 1727 Mackenzie conveyed the whole estate to Alexander Chisholm, and assigned to him the unexecuted precept in the Crown charter. Upon this precept Alexander Chisholm of Mackerach took infeftment in the *whole* estate. Alexander Chisholm then disposed the estate to Alexander Chisholm, the pursuer's father, and upon the procuratory contained in this disposition the pursuer's father obtained a Crown charter also of the whole lands, and was infeft. In 1744 Lord Lovat obtained a decree reducing the above title, in so far as related to the superiority of Kirkton-Comar. This decree was never extracted. In 1777 Alexander Chisholm executed a strict entail of the whole estate, by which the heirs were prohibited from granting leases for a longer period than nine years. This entail was recorded, but no infeftment followed upon it.

The entailor was succeeded by his son, Alexander Chisholm, who, in 1788, was served heir in general to his father, in the following terms: "Dict. Alexander Chisholm lator presentium, ut legitimus et propinquior hæres masculus ac etiam hæres taillæ et provisionis, dict. quond. Alexandri Chisholm, sui patris, secundum et in terminis dispositionis et literarum taillæ," &c. The retour then specified the entail of 1777 and its destination.

CHISHOLM  
v.  
M'DONALD.  
1800.

In virtue of the procuratory of resignation in the entail, Alexander Chisholm applied for a Crown charter of the whole lands, but in consequence of the opposition on the part of the Lovat family, the lands of Comar-Kirkton were struck out of the signature, and accordingly the Crown charter did not contain these lands. No title to these lands was expedite by Alexander Chisholm, but while in possession he granted leases of Comar-Kirkton beyond the term allowed by the entail of 1777.

Having died without male issue, he was succeeded by his younger brother William, who made up titles to the Crown lands by special service to his brother, and was infeft. In virtue of the procuratory contained in the entail executed by his father in 1777, he resigned the lands of Comar-Kirkton into the hands of Lovat's Representatives, and obtained a charter on which he was infeft.

He then brought a reduction of the leases of Comar-Kirkton granted by his brother, in so far as they were longer than the entail permitted.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—The late Alexander Chisholm had no right or title to the lands in question, either feudal or personal, except in his character of heir of entail. In that character alone he did, and could contract with the defenders. It was in that character alone he did or could possess the lands in question. His general service was only in the character of heir of tailzie.

But even supposing he had, by a regular deed, as heir-male in general, acquired any personal and unentailed right to the lands, which stood vested in his father, still, that right being personal, must have remained affected by any personal, however latent, obligation incumbent upon him. Such personal right was therefore qualified by the restrictions of the entail, so that the leases granted to the defenders cannot be supported beyond the period permitted by the entail.

A personal is altogether unlike a feudal title standing on the Register of Sasines. The former is liable to be qualified, limited, or altogether defeated by any even separate and latent back-bond, declaration, or obligation of the person vested with such personal right, and that not only in a question with himself,



but even with a third party, to whom he may have conveyed his right. The case of Denham of Westshiells, and that of Gordon of Earlston, support this proposition. The entail executed by the pursuer's father in 1777 was a deed binding upon Alexander Chisholm, and qualified and affected any title to the estate still personal which might belong to him. The entailer being vested in the personal title of the lands, had a perfect right to transmit them to his heir, or to any one else under any conditions or restrictions he might think fit. Accordingly, his deed of entail constituted an absolute obligation upon Alexander Chisholm to comply with all its provisions.

CHISHOLM  
v.  
M'DONALD.  
1800.

If the last proprietor, by executing the procuratory granted by the Commissioners of Inquiry to James Baillie, had thereby been feudally vested in the estate in fee-simple, the defenders might have pleaded on their trusting to the faith of the Records. But as the last proprietor had no feudal title to the lands, they cannot pretend to have relied on anything else than the personal faith of the party with whom they transacted.

PLEADED FOR THE DEFENDER.—The entailer had nothing more than a personal right to the lands. That right consisted of his right to the unexecuted procuratory granted by the Commissioners of Inquiry to Mr. Baillie. His son Alexander had two rights in his person to the estate. He had right to the said unexecuted procuratory, and he had also right under the entail. The one was absolute, while the other was limited. He could have sold the estate, assigning to the purchaser the disposition in favour of Mr. Baillie. As, therefore, Alexander Chisholm had it in his power to give an effectual warrant of sasine to a purchaser, he must also be held to have given an effectual warrant of possession to the defenders. It is now settled law, that if a person be both heir of line and heir of tailzie, if he contract debt, it is competent for his creditors to charge him to enter heir of line to his predecessor, and thereupon to adjudge his estate; and if they do so, and secure themselves before the entail be made effectual, they will carry off the estate. The defenders are therefore entitled to impute their author's possession to his personal unlimited right, and to maintain that it is sufficient to defend them against the present

ARGUMENT FOR  
DEFENDER.

CHISHOLM  
v.  
M'DONALD.  
1800.

action. A creditor is entitled to have recourse to every means of rendering his right effectual. If the character in which he contracted with his debtor be not sufficient to procure implement, he is entitled to search for and discover every other right of which he is in possession, and to found upon it to the effect of securing himself.

It is argued, that because Alexander Chisholm's right was personal, it must be taken with all its qualities. It is necessary, however, to distinguish between rights to heritable subjects and burdens on these rights, such as adjudications and heritable bonds. No qualification of rights to heritable subjects, even while they remain personal, will be effectual against a singular successor who obtains himself regularly infeft before the qualities or conditions be rendered real by sasine. This proposition is supported by the case of *Bell v. Gartshore*, and that of *Mitchell v. Fergusson*. It is impossible, therefore, to maintain that if a man have a full and complete personal right to a subject, it may be qualified by deeds separate from that by which he has his right, so as to affect a singular successor. It is farther settled, that an entail, while it remains personal, is not binding in a question with singular successors acquiring right from the heir in possession. Between the present case and the case of *Kelhead, Auchyndachy, and Kerse*, there is no material distinction. The late Alexander Chisholm had two separate and distinct titles in his person. His obligation to convert the fee-simple title into a tailzied fee, being contained in a separate deed unconnected with the other, cannot be held to be a qualification of the fee-simple title in a question with the defender.

LORD MEADOWBANK, Ordinary, Found "That the right to the lands in question in Alexander Chisholm, the entailer, was personal, and by the disposition thereof in his favour, by Alexander Chisholm of Mackerach, stood destined in the first place to the heirs-male of his body : Finds, That as the entail 1777 was not perfected by an apt infeftment from the true superior, the destination in the disposition 1742 by Mackerach was not thereby effectually altered or put an end to, and that therefore it remained optional to the late Alexander Chisholm, who was both heir-male and heir of entail of his father the entailer, to

make up titles to Mackerach's disposition, whereby, in the first instance, he would be free of the fetters of the entail: Finds, That by the service of the said late Alexander Chisholm, as *hæres masculus*, expressed distinctly as a separate character from that of *hæres taillicæ et provisionis*, he carried the unfettered personal right in the disposition 1742, and that his right was sufficient to support the leases granted by him to the defender, though upon terms inconsistent with the conditions in that deed of entail: Therefore sustains the defences."

CHISHOLM  
v.  
M'DONALD.  
1800.

The pursuer having reclaimed, the Lords "Altered and sustained the reasons of reduction."

JUDGMENT.  
Feb. 27, 1800.

LORD MEADOWBANK observed,—“The leases good. We are bound to interpret the service in the most liberal manner, so as to make the heir's deeds effectual.”

OPINIONS.  
MS. Notes,  
Baron Hume's  
Session Papers.

LORD PRESIDENT CAMPBELL.—“Some feudal questions introduced here, which are material to be understood. In the case of Blackethouse it was found, that where a party goes back to a remoter ancestor, and connects himself with a feudal right, he has then the preference; but where, as here, a party connects himself with one who has merely a personal right, he must take it with all its qualifications. This is the principle of the case of Denham, Kerse, and others.”

1. On the Session Papers BARON HUME, after giving the opinions of the Judges, observes,—“The fallacy of the argument in the paper for the defender lies where the President put it. In all the cases quoted by the defender, when the acquirer of a personal right, by taking infeftment, gets quit of the qualification of that personal right, such acquirer, by means of the infeftment, connects with some *anterior* feudal

right. Now the tenant, when he has taken possession, still connects with and depends upon the right of the letter of the tack, which is still personal. He never can go farther back, or connect with prior owners who had feudal rights, but are not owners to him. Case is this. Old Chisholm had right, by procuratory, to certain lands in fee-simple. He entailed these lands by a deed, on which no infeftment followed, and con-

veyed the same procuratory to heirs of tailzie. Alexander Chisholm served as such, and granted certain tacks, contrary to the terms of tailzie. His right being thus personal, was qualified with the tailzie, and so tacks are null. If he had executed the original procuratory, and got charter and been infeft, it would have been otherwise. There would then have been two distinct rights in his person, one feudal and absolute, the other personal and limited."—*MS. Notes, Baron Hume's Session Papers.*

2. On the Session Papers LORD PRESIDENT CAMPBELL himself writes as follows:—"What difference does it make whether the entailer's right was real or personal? He still was entitled to settle his estate by entail or otherwise. The entail 1777 was not perfected by any infeftment at all, either in the entailer's person or in that of his son Alexander, the next succeeding heir: but this Alexander made up titles by a general service, which connected him with the tailzie, and there can be no doubt that he was bound by the tailzie, whether he meant to connect himself with any of the prior titles or not. And as his right remained personal, those who contracted with him, whether as lessees or otherwise, were equally bound by the tailzie. Had he completed a feudal right in his person as heir to the estate under the fee-simple title, or even under the entail, if it was not recorded in the Register of Tailzies, then parties were entitled to say that they

dealt with him on the faith of the records, but the present case is very different. Case of Ross of Kerse is misunderstood. Ross never made up any title under the entail, but was charged to enter in special, and thereby connected with his father's infeftment under a title in fee-simple. But personal right always qualified by personal conditions. As the removal of these tenants is not commendable, any specialties in the case may be taken hold of; but without wounding the law in material points."

3. LORD PRESIDENT CAMPBELL again writes,—“Grantor of tacks had only a personal right, and it can never now be made feudal. He connected himself with tailzie by service, and bound by it, and the tailzie even referred to in the titles themselves. The distinction in Memorial for defender, between qualities appearing *ex facie* and separate, is neither applicable to this case nor well-founded. Thus latent back-bonds good against the assignee to such a right. Principle of decision in case of Bell of Blackethouse does not interfere with principle in case of Denham of Westshiells. First feudal right, whether connecting with immediate author or one more remote, must always prevail, for it denudes the person last infeft, and all others deriving right under him. The party who thus completes the feudal right in a proper manner, is no longer under a personal right, but under a feudal title upon record, and relies upon the faith of the record.

But the case of Denham supposes one pleading under a mere personal right, which has never been, and perhaps cannot be, feudally completed. Such a right must always be subject to every personal qualification and exception. The defenders in this case derive their leases from one whose right was, and continues to be, personal, and any attempt which they can now make to render it feudal, must come too late. See GRAHAM, *v. CREDITORS of GRAHAM*, 13th May 1795. Ross of Kerse, January 31, 1792."—*MS. Notes*.

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*An Entail Feudalized but not Recorded does not exclude those Creditors of the Heir possessing under it from attaching the Estate, whose debts, whether personal or real, were contracted prior to the date of recording.*

I.—SMOLLET *v.* SMOLLET'S CREDITORS.

THE trustees of Mr. Smollet purchased the estate of Symington in 1786, and, in terms of the directions of their constituent, conveyed it to Mrs. Jane Smollet and the other heirs named in the trust-deed, under all the clauses of a strict entail. Mrs. Smollet possessed the estate under this entail without an infestment. On her death Alexander Smollet, her eldest son, made up a title under the entail, on which infestment followed in 1789, but the entail was not recorded until 12th June 1793. Previous to recording the entail he had contracted considerable personal debts. On his death in 1799 his son, Captain John Smollet, was served heir of entail to him, and infestment followed, but he did not otherwise represent his father.

May 14, 1807.  
NARRATIVE.

The creditors of Alexander Smollet, whose debts were contracted prior to the date of recording the entail, constituted their debts against Captain Smollet, and led adjudications against the estate, with the view of bringing it to sale for payment of their debts. An action of ranking and sale was then brought, and no opposition having been made to it, a part of the estate was sold judicially. The purchaser, Mr. Carmichael, of East-End, doubting how far the creditors had power to bring the estate to a judicial sale, raised an action of multiplepounding,

SMOLLET  
v.  
SMOLLET'S  
CREDITORS.  

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1807.

calling into the field the creditors the pursuers of the ranking and sale on the one side, and Captain Smollet, the heir of entail on the other side, to debate the point.

Both these parties entered appearance in the action, and the cause was reported to the Court by Lord Armadale, Ordinary, on Informations. On considering the Informations the Court ordered a hearing in presence.

ARGUMENT  
FOR HEIR OF  
ENTAIL.

PLEADED FOR THE HEIR OF ENTAIL.—The entail, before it is recorded, has no operation against creditors ; but after it is recorded, it excludes all creditors, who have not already made their debts real upon the estate, except those of the entailer. In this respect, the recording of an entail is exactly similar to the taking of a sasine on an onerous disposition. The creditors of the person infeft, are not affected by any disposition till sasine is taken on it. Before that time, they can attach the estate for payment of their debts ; and if they complete their rights before the sasine is recorded, theirs will be preferable to it ; but if it be taken while the debts remain personal, all right in these creditors to touch that estate is extinguished. In the same way, while the entail was unrecorded, the creditors of the heir might have affected it, but when he put the entail upon record, he completed the right of the heirs of entail, and extinguished that of his own creditors to affect the entailed estate. The creditors, and the heir of entail, had each of them a power of affecting the estate. The one had the right of making their debts real upon it ; the other had the right of completing the entail, by getting it recorded, and putting the estate beyond being affected by debt. Both rights are equally onerous, and the one which is completed first must exclude the other. The heir in possession is as much bound to record the entail as he is bound to pay his debts, or give security on his estate for payment of them. By recording the entail, he fulfilled the former obligation, he completed the right of the heirs of entail ; and after this, it is impossible for his creditors to affect the estate. He might, instead of this, have voluntarily granted securities on the estate for the debts he had contracted before he recorded the entail, and if he had done so, these securities would have been good, and would have excluded the right of the heirs of

entail. But he has not done so : on the contrary, he has completed the right of the heirs of entail, and thus excluded his own personal creditors.

SMOLLET  
v.  
SMOLLET'S  
CREDITORS.  
1807.

In the same way, either right may be completed by judicial process, if the heir does it not voluntarily. The debts may be rendered real by adjudication, and, on the other hand, the entail may be recorded at the instance of the substitute heirs. Now, in this way, too, whichever right was first rendered real, excluded the other.

The creditors cannot complain of any hardship in this. They lent their money, not on the security of the estate, but on personal credit, and to this they continued to trust, though they knew that the estate was liable to be carried out of the reach of their diligence by any completed alienation. But, moreover, they must, if they thought or inquired at all about the estate, have known that it was entailed, since the entailing clauses are in the title-deeds, and must naturally have concluded that the entail would be recorded. This was an event, therefore, still more under their eye than an alienation of the estate, and yet, in this last case, no plea of hardship could have been pretended by creditors who lost their recourse on the estate by their own delay, and their reliance on personal security.

The debts of Alexander Smollet cannot possibly be effectual against the estate of Symington now, even if they could have been so during Alexander Smollet's life. That estate has passed to Captain Smollet, who having only served heir of entail to his father, does not represent him in any other capacity, so that the debts cannot be constituted against him, and without being constituted against him, they never can affect the estate, in which alone he is vested.

PLEADED FOR THE CREDITORS.—The Act 1685, which requires the registration of entails, expressly enacts that an entail, till recorded, shall have no force in relation to creditors. Before recording, it is just as if it had never been executed at all. Whatever effect it has, therefore, against creditors, must be, by its operation, after it is recorded, and not before. It cannot have a retrospect.

ARGUMENT FOR  
CREDITORS.

It is evident from the provisions of the Statute 1685, relative

SMOLLET  
v.  
SMOLLET'S  
CREDITORS.  
1807.

to the publication of entails, that the Legislature did not mean they should ever have effect against creditors who had contracted prior to the time of recording the entail.

If creditors had been left, without any public warning beyond that contained in the title-deeds, to trust a person whom they saw in possession of a large estate, and should then have been cut out from all recourse against it, much evil must have resulted to the community. Personal credit is given to a person on the faith of the property he possesses. A man with a large estate in land is sure to have personal credit to a great amount, merely from his possessing it. The ordinary creditors of a man of fortune can have no means of making themselves acquainted with the state of his titles: they must, therefore, have frequently given credit to the possessors of entailed estates, and would have been ruined, if this had been the operation of recording the entail. But, to prevent this evil, the Statute 1685 provided a mode of giving public notice of the existence of entails, that might enable every one easily to know whether an estate be entailed or not, and, consequently, whether he should give credit to the possessor. The object of this provision is to make personal creditors safe, and when they find no entail in the Register of Tailzies, they are entitled to regard the estate as a fee-simple, and their recourse against it as perfectly secure.

But all the advantages of this provision must be overturned, if it is now to be held, that an entail, though not registered when debts are contracted, will cut out the creditors in those debts from all recourse against the estate whenever it is registered. In that case, personal creditors would be as insecure as ever. Though no entail was known of, one might be lurking in the hands of the debtor himself, who might register it whenever he chose, and cut them out from ever affecting the estate, or the same thing might happen by the heirs of entail obliging him to record it. It would be vain for personal creditors to endeavour to realize their debt by diligence. For the form of registration, whether voluntary or judicial, is far more rapid than adjudication or judicial sale, and could always carry off the estate. In short, it is plain that if an entail, when registered, were to strike against debts contracted before registra-



tion, the registration of tailzies is of no earthly use, and merely serves to ensnare personal creditors by a delusive show of security. There can be no doubt, therefore, that when the Legislature provided that entails should not be effectual against creditors till they were recorded, it must have regarded them, as being by their form and nature which it had expressly designated, calculated to affect only those creditors who contracted after the period when the entail began to operate.

SMOLLET  
v.  
SMOLLET'S  
CREDITORS.  
1807.

Captain Smollet does represent his father, because he has taken up by service an estate in which his father was vested. It is true, he has taken it by service as heir of entail, and, in regard to the world in general, he is truly a mere heir of entail of his father, because to the world in general, the entail is valid. But to the creditors of Alexander Smollet, who contracted before recording of the entail, Captain Smollet is not an heir of entail, for, in relation to them, the entail has no validity. His service, so far as relates to them, is equivalent to service as heir of a fee-simple. They are entitled to hold the entailing clauses as if they were blotted out of the deed. So far as regards them, therefore, Captain Smollet does represent his father.

The Lords Found, "That the lands and estate contained in the deed of entail executed by Mr. Robert Scott Moncrieff, as surviving trustee of the deceased Mr. James Smollet, are attachable for the debts contracted by the late Alexander Telfer Smollet, the heir of entail in these lands, prior to the date of recording said entail in the Register of Tailzies, and therefore find that the diligence used by the creditors on their debts, is good and effectual against said tailzied estate."

JUDGMENT.  
May 14, 1807.

LORD MEADOWBANK observed,—“I have no doubt about this question in the practice of the country. The intendment of the Act is clearly to secure the public, not to enable proprietors to defeat the rights of creditors. In particular, this appears from the clause as to omitting limitations in the transmissions, which it makes an irritancy, while at same time it secures the contravener's creditors, personal or real. This clause affords a clear ground of exposition of the other parts of the Act. I

OPINIONS.  
MS. Notes,  
Baron Hume's  
Session Papers.

SMOLLET  
v.  
SMOLLET'S  
CREDITORS.  
1807.

have always judged accordingly. I must hold all former lawyers and judges blind on the subject."

LORD NEWTON.—"I have given twenty opinions to the same purpose, on which great sums have been lent. I should hold myself liable in damages if any other judgment were given. Insertion in titles is nought without registration. Before the Act 1685, the effect of limitations was very doubtful. The Legislature compromised the matter by its provisions for public interest."

LORD ARMADALE.—"I understood the matter to be thoroughly settled. The character of our law is very favourable to creditors, personal as well as others. Hence enactments in favour of creditors of apparent-heirs, and of personal creditors of ancestor doing diligence in three years. It is presumable, therefore, that Act 1685 could mean real creditors only. The words, "*being so inserted*," plainly make all the requisites conditions of the validity of the tailzie. There is nothing to limit the Act to posterior personal creditors more than posterior adjudgers. It is much too late to move such a doubt after the settled practice of the country. As to the difficulty of attachment—if tailzie not good, ordinary forms will apply."

LORD JUSTICE-CLERK HOPE.—"My opinion is different. The tailzie was followed with infestment bearing intimations, and that sasine recorded. Any one dealing with the heir, saw that he had a right defeasible in a certain event, by registration. All such were bound to inspect record of sasines as much as of tailzies. A personal creditor never contracts on faith of the estate. He only takes a general view of his debtor's circumstances, such as *ex facie* they make his credit. But he does not properly contract on faith of the estate, for if he did, law would bring him *pari passu* with an heritable creditor. Even where heritor is such in fee-simple, if the creditor stands by, and lets him encumber with heritable bond, he is cut out. In short, until he do something in attachment of the estate, he cannot touch it at all. It may be sold or encumbered to his exclusion. An heir of tailzie is under an onerous obligation to the substitutes equally as to his other creditors. Even, therefore, if this question had been with first debtor, I should think there was no room for complaint, more than if he had

given an heritable bond on the estate to its value. The personal creditor in either case has himself to blame. But this case more favourable, as first debtor died without adjudications being led. Now, in such a case, the personal creditor must constitute, which he can only do on the ground of representation and *eadem persona*, which do not apply to the case. An heir of tailzie cannot renounce. He can only give up his life-rent, not the right of his heir. All these maxims and fictions, therefore, are inapplicable. There is a *medium impedimentum* which excludes the creditors. As to the point being fixed, if I had been consulted, I would have advised creditors to take an heritable bond. There is no judgment of this Court to that purpose. In Westshiells there was no infeftment, and on that ground the House of Lords decided."

SMOLLET  
v.  
SMOLLET'S  
CREDITORS.  
1807.

LORD PRESIDENT CAMPBELL.—"I am clear that creditors contracting with an heir of tailzie may adjudge effectually, if deed is not recorded. The estate is subject to that liability. The question is as to effect of debts, which have not been made to affect the estate before recording. The debts prohibited in a tailzie are debts to affect the estate. This heir represents his predecessor as heir of tailzie only, and the tailzie was complete at the time of his succession. In first debtor's lifetime, question would have been more difficult. The purpose of registration is only to protect the estate, not to warn the public against contracting personal debts. It is not at all of the nature of an inhibition. I am not acquainted with any understanding of the law by the country as to the case of the first debtor. The case of Rothies and other cases, were cases of descent for generations, still without registration. That question never yet tried. The case here is that of an heir taking a complete tailzied estate, which he takes from the entailer. It is the same case with that of Graham of Houston, in which, also, by proper measures, the estate might have been made liable. Principle of it applies."

LORD CRAIG.—"I have been clear all along, that a tailzie not recorded, is none at all as to the interest of creditors. It wants that without which it is no tailzie. Creditor is in *bona fide* to look on it as none. The whole strain of the Act is to that purpose. Thus Captain Smollet does represent, so far as relates to debts contracted before recording."

1. On the Session Papers LORD PRESIDENT CAMPBELL has written,—“TAILZIE. Whether personal creditors of a prior heir of entail, where debts were contracted before tailzie was recorded, can now attach the estate in the person of an heir who has succeeded after the tailzie was duly recorded, and made up titles as heir of tailzie? Question resolves into this, Whether the present Mr. Smollet represents his father as to these debts, or, in other words, whether they can be constituted against him so as to be a ground of attaching the tailzied estate, no step having been taken to make them effectual during the life of the contractor of these debts? The cases of *Roths*, 14th December 1758, and *Rosebery*, 22d June 1765, are so far different, that the entails remained still unrecorded when actions were brought to constitute the debts against the heir in possession, and to make the estate liable. Estate was found liable *ad valorem*. Case of *Graham of Houston*, 13th May 1795, not exactly the same, as *Harry Graham*, who contracted the debts, had never made up titles, nor been anyhow invested with the estate, except as apparent-heir. Case of *Syme v. Dewar*, 1st February 1803—Session Papers that year, *Graham of Morphie*. When a personal creditor lends his money upon personal credit, he does not look at the records at all. But when he comes to adjudge or to demand security upon the estate, he must see how matters then stand, and whether he can have

access or not. Heir now in possession—does not represent except as heir of tailzie. Can a decree, therefore, be taken against him as *passive* liable, to the effect of adjudging the tailzied estate, the tailzie having been rendered complete before he succeeded? Heir does not incur any irritancy by contracting personal debts. He may be a bankrupt before he succeeds. Tailzie does not strike against these, but against bringing them upon the estate. Lord Kaim's notions go too far in this respect, *voce* Tailzie. Can he be charged instantly upon succeeding, without allowing a moment to record the entail? See notes on case of *Graham of Morphie*, Session Papers, November, &c., 1804, N. 103. See case of *Chisholm*, 27th February 1800. Heir of entail does nothing tortuous or illegal when he contracts personal debt. But he does so, and is guilty of a contravention for which he may be forfeited of his estate, if he allows estate to be adjudged for personal debt. Perhaps next heir is ignorant of the existence of such an entail, and may be an infant or out of the country, so that no blame is imputable to him for not immediately recording the entail.

2. “In all the cases founded on in this Information, the last entail remained incomplete and accessible to debts when the competition arose. The case here is different. Captain Smollet having succeeded to a completely tailzied estate, so that not a shilling of his own debts can attach upon it, so far he is in same case with *Graham of*

Houston. See also case of Glencairn, 23d May 1800. If he allows this judicial sale and adjudication to take place, he will incur a forfeiture. Can he relieve himself by applying to Parliament?—no bankrupt estate here. By decision in case of Stormont in 1662, it was fixed that even at common law tailzie was good against creditors, &c., by the operation of the clauses themselves,

without being entered in a particular register. This altered, or so far restricted by Act 1685 requiring a register, but mere personal debts could not attach upon estate without some step being taken to bring them upon it by adjudication or otherwise. In England certain forms also necessary. Blackstone, vol. iii. pp. 4, 14."—*MS. Notes, Sir Ilay Campbell's Session Papers.*

## II.—ROSS v. DRUMMOND.

In 1783 George Ross of Cromarty executed a strict entail of that estate on himself and the heirs of his body, whom failing, on Alexander Gray and the heirs-male of his body, whom failing, to other substitutes. Having died without issue, Alexander Gray became entitled to the estate, and in 1787, he took infestment under the entail, and in terms of the entail changed his name to Ross. After succeeding to the entailed estate he became indebted in a large amount to Messrs. Drummond, bankers in London. In 1803, after the debt to the Messrs. Drummond was contracted, one of the substitutes applied to have the entail recorded, which was done accordingly. After the entail was recorded, the Messrs. Drummond raised an action of constitution against their debtor, in which they obtained decree in 1806. They then raised an action of adjudication against the estate of Cromarty, in which they obtained decree on 17th February 1808, which was duly recorded, and on 16th April they presented a signature in Exchequer. A ranking and sale of the estate had been already brought at the instance of certain heritable creditors, and in this process the Messrs. Drummond produced a claim.

In 1820 Alexander Gray or Ross died, and thereafter the pursuer, as the next heir of entail entitled to succeed to the

ROSS  
v.  
DRUMMOND.  
1831.

estate of Cromarty, brought an action of reduction for setting aside the adjudication of the Messrs. Drummond, on the ground that the estate could not be attached for payment of the debts due to them.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—The defender's debtor was not an heir *alioqui successuris*. He had no right to the estate except under the conditions of the entail. That entail imposed upon him certain obligations in favour of the substitute heirs, and created in each of them a *jus crediti*, which was made real by the infeftment taken upon the entail in 1787. That infeftment was taken prior to the existence of the debts in question. As therefore the heirs of entail had acquired a real right to the estate, they could not be affected by personal debts subsequently contracted by the heir in possession.

Prior to the Statute 1685 entails were considered effectual, not only *inter hæredes*, but with third parties. That Statute, which was partly declaratory of the law, and partly corrective and penal, was not intended to alter the common law, but merely to secure tailzies more effectually. One of the enactments was, that the entail should be recorded, in order to render it real and effectual, not only against the contraveners and their heirs, but also against "their creditors, comprisers, and adjudgers, and other singular successors whatsoever." It is true that it has been held, that although infeftment may have been taken upon the entail, yet if the entail itself has not been recorded, and if debts have been made real upon the estate, they will be effectual; but there is no authority, either in the Statute or otherwise, for holding that it is competent to attach the estate for debts of a personal nature, after the entail has been recorded. On the contrary, it is evident, from the words of the Statute, that by the recording, a real right was constituted in favour of the heirs-substitutes; and therefore this real right cannot be affected or injured by the claims of personal creditors attempting subsequently to attach the estate. Accordingly, this principle was recognised by the House of Lords in the case of Sheuchan; and although no doubt the case of Smollet is at variance with the plea maintained by the pursuer, yet that decision was pronounced only by a majority;

and the principle is in opposition to that established in the case of Sheuchan.

ROSS  
v.  
DRUMMOND.  
1831.

As Alexander Gray or Ross had right only to the estate in virtue of the entail, his personal creditors could only attach it *tantum et tale*, as it stood in his person, and consequently subject to the restrictions and limitations contained in it.

PLEADED FOR THE DEFENDER.—It is a fundamental principle of law that every man's estate, in whatever manner he may have acquired it, is liable to the onerous debts which he has contracted. An exception to this rule is introduced by special Statute, in the case of persons holding an estate under the fetters of a strict entail. In order, however, to secure due intimation of the exemption of any particular property from its general liability for the debts of the proprietor, certain forms of publication are carefully prescribed by that Statute. If any of these forms of publication are neglected, the estate remains subject to its original liability in a question with creditors whose debts were contracted prior to the completion of the statutory forms. ARGUMENT FOR  
DEFENDER.

It is a mistake to say, that at common law entails are effectual against onerous creditors, or that the heirs-substitutes, who are mere gratuitous disponees, have such a *jus crediti* as can be made effectual to exclude onerous creditors, where the entail has not been recorded in terms of the Statute. It is plain, from the words of that Statute, that the exemption of the estate from liability is merely conditional and dependent upon the recording of the entail. If not recorded, the estate, in regard to creditors, is considered as held in fee-simple; and, consequently, by no act which may be done subsequently can the estate be protected against these debts. The question, too, is no longer open, for it was decided in the cases of Smollet and Ferrier.

It is true, that where a proprietor's right is merely personal, his creditors can only attach the estate *tantum et tale* as he possesses it. But where his right has been made real by infeftment, they can only be affected by what appears on the record; and as it is essential to the protection of the estate, that the entail shall appear in the Register of Entails, creditors are

ROSS  
v.  
DRUMMOND.  
1881.

entitled, when there is no such entail recorded there, to act on the faith of the estate being held in fee-simple.

LORD NEWTON, Ordinary, reported the case to the Court, and in a Note observed,—“ The Lord Ordinary sees nothing in the pursuer’s argument to induce him to think that the case of Smollet was erroneously decided ; but as the authority of this case is alleged to have been weakened by the judgment of the House of Lords in the Sheuchan case, he thinks it proper to report the present cause, that the opinion of the Court may be obtained.”

JUDGMENT.  
June 11, 1828.

The Court “ Sustained the defences, and assoilzied the defenders.”

OPINIONS.

LORD PRESIDENT HOPE observed,—“ It is impossible that we can distinguish this case from that of Smollet. Both President Campbell and myself were against that decision, and the note which I then made on my copy of Erskine is expressed in these terms :—‘ The President (Sir Ilay Campbell) and I were against this judgment, on this ground, that the making up titles by Captain Smollet, as heir of tailzie under a tailzie completed by infestment, and recorded, was a *medium impedimentum*, which prevented the previous personal creditors of the ancestor from attaching the estate. They might have got a security over the estate ; but they did not do so in time. By the allowing the entail to be recorded, and the heir to make up his titles, they put themselves exactly in *pari casu* with personal creditors who allow diligence of any other kind to be done against the estate, or their debtor to sell it to their prejudice.’

“ The other judges, however, were against us ; and it must therefore be regarded as a ruling decision, at least in this Court. Besides, we adhered to it in the case of Ferrier : so that, until a different rule be laid down by the House of Lords, I must consider these cases as fixing the law. The principle of the case of Smollet was, that, in relation to creditors, the heir in possession was to be considered as a fee-simple proprietor.”

LORD GILLIES.—“ Precisely. Indeed, on reading these papers, I regarded the law as so completely settled by the case



of Smollet, that I did not take the trouble to form any opinion upon the subject."

Ross  
v.  
DRUMMOND.  

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1831.

The pursuer having appealed to the House of Lords, "It was declared that the registration of the deed of entail prior to the date of the decrees of constitution and adjudication, does not, in this case, bar the claims of the creditors against the entailed estate in respect of debts contracted prior to such registration; and with this declaration it was ordered and adjudged, That this cause be remitted back to the First Division of the Court of Session in Scotland, to proceed therein as shall be just and consistent with this declaration, it not being the intention of this House to give an opinion upon any other points arising between the said parties in this cause."

HOUSE OF  
LORDS,  
Aug. 30, 1831.

LORD LYNTHURST observed,—“ The question for your Lordships’ consideration, and which is one of much importance, is this :—The present respondents being the personal creditors of the bankrupt, Alexander Ross, the deed of entail being recorded in 1803, while the debt was a mere personal debt of Alexander Ross, and the adjudication not taking place until 1808, the question is, under these circumstances, whether this decree of adjudication against this entailed estate, pronounced subsequently to the period when the entail was recorded, can or can not be sustained? My Lords, when this case came on, a noble and learned Lord (the Earl of Eldon) conversant not only with Scotch law in general, but conversant deeply with this particular branch of Scotch law, namely the law of entail, attended here, on account of the importance of the question, for the purpose of hearing the discussions and arguments at your Lordships’ bar. The case has stood over from time to time, in order that I might have the opportunity of attending with that noble Lord, and that he might move your Lordships for judgment in this case. Circumstances, however, have interfered to prevent it. But I have had an interview with that noble and learned Lord, who, in consequence of indisposition, has been under the necessity of leaving town. I know his views of the subject, and they entirely concur with my own; and in moving this judgment, I beg that it may be considered I am acting according to the opinion and judgment of that noble and learned

ROSS  
v.  
DRUMMOND.  
1881.

Lord, as well as according to the opinion and judgment which I myself have formed, after hearing the arguments at your Lordships' bar, and after reading with considerable attention the printed papers and cases referred to.

" My Lords, it is unnecessary for me to trouble you with any observations upon the law of entail as it existed at common law in Scotland, because, according to my view of the subject, this case turns entirely on the construction of the Statute 1685. My Lords, by that Statute power was given to his Majesty's subjects in Scotland to entail their estates in certain forms, subject to certain restrictions ; and those forms and those restrictions are distinctly and clearly pointed out in the Statute ; and it is declared in that Statute, that those entails shall only be allowed in which irritant and resolute clauses are inserted in the procuratories of resignation, and the charters, precepts, and instruments of sasine, and which are produced before the Lords of Session for the purpose of being recorded, and which are recorded in the manner stated in the Act. It appears to me, that nothing can be more distinct than the language of the Act in this respect, that those entails only are to be allowed which are executed, registered, and recorded according to the provisions and directions of the Act. The Act afterwards goes on to say—for that is the construction which I put upon the Act, and the construction which my noble and learned friend puts on the Act—that those regulations having been complied with, the entail shall ' be real and effectual against their creditors, comprisers, adjudgers, and other singular successors whatsoever, whether by legal or conventional titles.' Some doubt has arisen with respect to the construction of those last words ; and it is contended by the appellant, that the meaning is this : that they shall be binding on the creditors, whether they ' are comprisers or adjudgers, or other singular successors, by legal or conventional titles,' thereby excluding personal creditors. But my Lords, I apprehend that that is not the natural construction of the clause. The natural and obvious construction, as it appears to me, is this : that they are to be binding against creditors generally, and not only against creditors generally, but against those creditors who claim by comprising, adjudication, or such other creditors as come under the description of singular successors.

whether by real or conventional titles. If then this be the construction which I put upon the Act, and which the noble and learned Lord puts upon the Act, it is binding upon personal creditors, provided the requisites of the Act are complied with ; and it follows, therefore, as a matter of course, that if the requisites of the Act are not complied with, that in that case it is not binding on the personal creditors. Looking, therefore, at the first clause of the Act, it is declared that those tailzies shall be allowed which conform to the requisites of the Statute, and that those entails shall be binding against the personal creditors only in case those requisites are complied with ; and if they are not complied with, then that they shall not be binding against the personal creditors, and the party entitled to the estate will have no claim under the entail.

ROSS  
v.  
DRUMMOND.  
1881.

“ But, my Lords, it is said, that true it is, or true it may be, that an entail is not binding against a personal creditor unless the requisites of the Act are complied with ; but that when it is recorded, from that moment it is binding against the personal creditor, unless the personal creditor has, previously to the recording of the entail, led an adjudication against the estate. My Lords, I apprehend that that was not the meaning of the Legislature. The intention of the Legislature, by requiring the entail to be recorded, was, that notice should be given to all the world that the party in possession held under an entail ; and the obvious meaning of the Act is this, that unless the entail is recorded the party is to be considered, not as holding under the entail, but as holding in fee-simple, and that the claims of the creditor with respect to the land are precisely the same as if, instead of the party being entitled only to an estate in tail, he was entitled to an estate in fee-simple. If that be the case, it is quite impossible, as it appears to me, that the Legislature could ever intend that a subsequent recording of the entail should have a retrospective effect, so as to defeat the right of the creditor ; because, if that be the construction of the Act, the very object of the Act would be entirely defeated, for at any moment, the entail not being put on record, parties having advanced money to the person entitled to the entailed estate, advancing that money upon the assumption that the estate was an estate held in fee-simple, would instantly be de-

ROSS  
v.  
DRUMMOND.  
1881.

prived of their right upon the estate by the mere fact of recording, which recording might instantly be effected. It appears to me, therefore, that the Legislature never could have intended that, and that in point of fact to put that construction on the Act of 1685 would defeat the very object which the Legislature had in view in passing that Act. Then, my Lords, here the Messrs. Drummond being personal creditors to a very large amount, continuing personal creditors for a long period after Alexander Ross was infeft in this estate, but the recording the entail taking place before they obtained their decree of adjudication, that did not defeat the right of Messrs. Drummond to go on with their adjudication, and to make their claim against the estate real and effectual, precisely in the same way as if, instead of being an estate-tail, it had been an estate in fee-simple. This is the view of the subject the noble and learned Lord, to whom I have referred, has taken.


“ But, my Lords, this does not depend solely on the construction of the Act of Parliament ; it becomes material to inquire whether there are any authorities upon this subject, and what is the effect of those authorities. My Lords, the well-known case of Smollet was cited at your Lordships’ bar. It was not pretended that the case of Smollet differed, as far as relates to the point to which I am now calling your Lordships’ attention, in the slightest degree from the case now under consideration. It was admitted by the counsel for the appellant, that (to use the phrase of the lawyers) it was a case, as to this point, on all-fours with the present. My Lords, that case was decided by the Court of Session as far back as the year 1807. It was decided, after very full argument, and after much debate and consideration. I am bound to say, that the President of the Court, Sir Ilay Campbell, a very great lawyer, did not acquiesce in that decision ; but still, the great majority of the Court of Session were in favour of it. My Lords, that decision was acquiesced in ; it was not made the subject of appeal, as it might have been, to your Lordships’ House ; and from that day to the present period, a period of twenty-four years, this very point, so decided in Smollet’s case, has been acted upon, and no contrary decision is to be found. But, my Lords, previously to Smollet’s case, the same question came before the Court in the

case of the Creditors of Grahame. In that case the point was raised, but not argued. It was decided, without argument, in a manner conformable to the decision in Smollet's case. It may be said, the point not having been argued, not having been agitated, that is a case not entitled to much weight. I cite it, my Lords, not as entitled to much weight as a decision of the Court, but I cite it, as shewing what the opinion of the lawyers of Scotland was, with respect to that question, twelve years before the decision of the case of Smollet.

ROSS  
v.  
DRUMMOND.  
1881.

" But, my Lords, since the decision of the case of Smollet, the question has again arisen in the case of Ferrier. That case arose between six and seven years after the case of Smollet, and the decision originally was the same way with that of Smollet. It was there considered that those personal debts which existed previously to the recording of the entail were binding, when followed up by adjudication subsequent to the recording of the entail ; and the decision in the first instance proceeded on that ground ; it was in favour of the Creditors. That decision, however, was afterwards altered, but altered on special circumstances, entirely conformable with the principle of the original decision, and which was this, that it turned out on subsequent inquiry, that the money which was the foundation of the debt was not actually advanced until after the entail was recorded. I consider the case of Ferrier as a strong authority confirming the decision in the case of Smollet.

" I have stated that there is no contradictory, no opposing decision. But it has been supposed that the case of Sheuchan, decided in your Lordships' House, is at variance with the principle of the decision in that case of Smollet ; and some remarks and observations made by the noble and learned Lord who moved the judgment in the case of Sheuchan have been much insisted on by both sides, in the course of the argument. It is important, however, that I should state, from the knowledge I have of the noble and learned Lord to whom I am referring, from the conversations I have had with him on this question, that he himself does not consider the decision in Sheuchan's case as adverse to the decision in Smollet's case. He does not consider that any expressions which fell from him in moving that judgment, and which are ascribed to him, are at all incon-



ROSS  
v.  
DUNCANSON.  
1831.

sistent with the view of the case he now takes. My Lords, in Shenchan's case the entail was executed in consequence of a valuable and monied consideration. There was an actual purchase of the settlement. The parties, therefore, entitled under that settlement, were in the nature of creditors upon the estate; they were as much creditors as any other of the creditors of the person who was the owner of the estate, the settler, who was John Vans; and it was upon that principle, and upon that principle alone, the question was decided. The situation, therefore, in which the parties then stood, and the nature of the transaction, were widely different from the present; and it would be to put a very forced construction on the case of Sheuchan to extend it to a case like the present. It appears to me that the case of Sheuchan does not in principle militate against the case of Smollet, that the case of Smollet falls far short of it in principle, and that the language made use of by the noble Lord who moved that judgment is not at all at variance with the case of Smollet; and, therefore, that that case, supported as it is by the decision in Ferrier, and supported as it is to a certain extent by the case of the creditors of Grahame, stands unopposed by any conflicting authority.

"Upon the whole, my Lords, it appears to me that the sound and true construction of the Act of Parliament is that which I have stated, namely, that until everything that is required by the Statute 1685 is complied with, the party is to be considered as holding, not an estate in tail, but an estate in fee-simple; that it is liable to his personal creditors; that a subsequent recording of the entail will not have a retrospective effect, so as to defeat the right and title of the creditors; that, if you allowed it such an effect, it would in point of fact destroy and disappoint the very object of the Act of Parliament. Resting then, my Lords, upon this construction of the Statute, and fortified by the decisions to which I have referred your Lordships, it appears to me, the decision of the Court of Session, sustaining the decree of adjudication, is correct, and ought to be affirmed. It is proper, however, my Lords, that I should state, that with respect to that decree of adjudication there were several other points (some of them material and important points) which were urged at your Lordships' bar, and also

urged in the Court below. But the attention of the Court of Session appears to have been directed solely to the question to which I have called your Lordships' attention ; they seem to have passed over for the present the other objections made to the decree of adjudication. Therefore, acting also in conformity with the opinion expressed by my noble and learned friend, to whom I have referred, I would advise your Lordships to state what your opinion is upon the first point, and then remit the whole case to the Court of Session, in order that they may do what is just and proper with reference to the other points presented to their consideration, and to which they do not appear so much to have attended, waiting your Lordships' decision upon this, which was the great and material point agitated before them. Under these circumstances, I shall move your Lordships that this case be remitted to the Court of Session, with an expression of your Lordships' opinion in the terms I have referred to."

ROSS  
v.  
DRUMMOND.  
1831.

1. In the narrative of the preceding case it was omitted to be stated, because unnecessary for the adjudication of the point under consideration, that in 1788 and 1800, Alexander Ross granted several heritable bonds over the estate of Cromarty, and that in consequence of this the pursuer, as next heir, brought an action of irritancy against him, and in 1805 obtained decree in absence. Against this decree representations were lodged by Alexander Ross, and the Creditors who had obtained heritable securities from him. No farther proceedings took place in the action till 1808, when the pursuer brought a new process of declarator, which was conjoined with the former, and various steps

were taken between that period and 1817, when it fell asleep. On the action of reduction being remitted to the Court from the House of Lords, the pursuer PLEADED,—That as the last heir of entail had committed a contravention, and as a decree had been obtained against him by the pursuer in a declarator of irritancy, no subsequent diligence could affect the estate, as the debtor's right to the estate was thereby judicially declared to be at an end. The defenders PLEADED,—That as the entail was not recorded at the date when their debts were contracted, the heir in possession was in a question with them a fee-simple proprietor, and that any acts of irritancy, whether com-

mitted before or after the contraction of their debts, could no more affect them than similar acts of irritancy when committed by an entailer could affect his creditors. The Court " Found that the dependence of the conjoined processes of declarator of irritancy and contravention against Alexander Ross, and the interlocutor or alleged decree founded on, does not bar the claims of the defenders against the entailed estate, in respect of debts contracted prior to the date of recording in the Register of Tailzies, the entail of the estate of Cromarty, and does not affect the decrees of constitution and adjudication in favour of the defenders. Therefore to that extent sustain the defences."—*Ross v. Drummond*, Feb. 9, 1836.

2. The unanimous opinion of the Court is given in the following opinion framed by Lord Mackenzie and approved of by the other judges:—" An entail not registered has not the authority of this Court interponed to it, and gives not the public notice which the Statute requires. It is therefore of no force, and equal to an entail not yet existent, in reference to any third party contracting with any heir who is in possession of the entailed estate. The substi-

tutes of entail have, in reference to such creditors, no rights whatever founded on the entail; and debts so contracted by such heirs are in the same situation as entailers' debts. Creditors in such debts cannot be affected by any subsequent registration of the entail, which, in reference to them, has no warrant; nor by any proceedings upon the entail, which, in reference to such creditors, are entitled effectually, and such as they are not bound to acknowledge, no matter to what extent these proceedings may have gone. The principle of the decision in the case of *Smollet* went that length, since there, after the contraction of the personal debt by an heir of entail, the entail was registered; and after the registration the estate was brought to judicial sale by the creditors, in spite of the fetters, on the principle that, in respect to the creditors, the entail was as if it never had existed, nor anything had been done upon it. This principle must equally apply in the present case to the registration, and to the decree of forfeiture, or any other proceedings which did or could follow on the entail, in reference to creditors who contracted while the entail was still unregistered."

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*An Infeftment upon an onerous Entail, in which the Entailer is the Institute, and against whom, as well as the other Heirs, the prohibitions are directed, excludes those Creditors of the Entailer from attaching the Estate whose debts were not made real prior to the Infeftment.*

## STEWART v. AGNEW.

JOHN VANS of Barnbarrach, and his father-in-law, Robert Agnew of Sheuchan, agreed to execute a mutual entail of their respective estates. In implement of this agreement a contract of entail was executed in 1757, by which Robert Agnew gave, granted, alienated, and disposed, in favour of John Vans and Margaret Agnew, his spouse, and to the longest liver of them two, and to the heirs and substitutes of entail therein mentioned, his lands and estate of Sheuchan. In implement of his counter-part of the agreement, and in consideration of the sum of £3000 sterling paid by Robert Agnew to John Vans, John Vans, by the same deed, gave, granted, sold, alienated, and disposed, in favour of himself and Margaret Agnew, his spouse, and the longest liver of them two, his estate of Barnbarrach.

July 31, 1822.  
NARRATIVE.

The deed declared, that in case any legal diligence should happen to be used against the fee of the lands and estates, or any part thereof, upon any debts or deeds of John Vans or Margaret Agnew, to be contracted or done by them, or either of them, after the date of the deed, or to be contracted or done by any other of the substitute heirs of entail, either before or after the succession to the estates, not only should any such diligence be null, in so far as it might affect the estates, but also the said John Vans or Margaret Agnew, and the other heirs of entail upon whose debts the diligence may have proceeded, should *ipso facto* forfeit his or her rights to the said entailed estates.

The deed also contained a clause in regard to the debts previously contracted by Mr. Vans, by which it was declared that neither the said John Vans or Margaret Agnew, nor any of the other heirs of entail who should succeed to the lands, should

STEWART  
v.  
AGNEW.  
1822.

suffer any special adjudications to pass against the lands for payment of the debts of the said John Vans, contracted before the date thereof; and in case any general adjudication, or other legal diligence, should pass against the lands for payment of the said lands, it was declared that the said John Vans and Margaret Agnew, and the heirs succeeding to the estate, should be bound to redeem such adjudication or legal diligence within four years from its date, and in the event of their failing to do so, the lands to devolve upon the next heir of entail.

From the date of the execution of the deed John Vans assumed the name of Agnew. On the joint petition of Messrs. Agnew and Vans, the deed was presented to the Court and duly recorded in the Register of Entails in January 1758.

Mr. Agnew died in 1774, having been predeceased by his daughter, Mrs. Vans, and leaving personal funds to a large amount. Soon after Mr. Agnew's death, John Vans executed the procuratory of resignation contained in the deed of entail, and obtained a charter in terms of it, in virtue of which he was infeft in May 1775. In 1780 he died, leaving three sons and two daughters. At the date of his death his debts amounted to upwards of £11,000. On his death his son Robert assumed the name of Agnew, and was infeft on the entail in 1781.

The creditors of John Vans having assigned their debts to Messrs. Stewart and Drew as trustees, these gentlemen charged Robert to enter heir to his father, and he having declined to do so except under the contract of entail, they obtained decree *cognitionis causa* against them. They then raised an action against him concluding that the entail should be reduced, as having been granted in *fraudem creditorum*, or at least that it should be found that all the debts of John Vans were effectual against his estate of Barnbarrach. In this action Robert and the heirs of entail in existence were called as defenders. Among these was his eldest son, the pursuer, who was then about five years of age, and resided with his father. Lord Braxfield was appointed his tutor *ad litem*.

ARGUMENT FOR  
PURSUER IN  
ORIGINAL  
ACTION.

PLEADED FOR THE PURSUER.—The validity of entails is now regulated solely by the Act 1685, and those entails only can be sustained which correspond to the description in that Statute.

and the structure of which is in conformity with the directions it prescribes. An entail which imposes fetters on the entailer himself is no object of that Statute, the express terms of which exclusively refer to limitations in the person of heirs only. This distinction is most important to be attended to, as dangerous sources of fraud would otherways be opened up.

STEWART  
v.  
AGNEW.  

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1822.

PLEADED FOR THE DEFENDER.—The entail in question was an onerous deed, the one entail being made in consideration of the other.

ARGUMENT FOR  
DEFENDER IN  
ORIGINAL  
ACTION.

LORD JUSTICE-CLERK MILLER having reported the cause to the Court, the Lords Found “That the tailzie under reduction is still a subsisting deed, and repelled the reasons of reduction, but found that the estate of Baronbarrach is still affectable by the debts due by John Vaus of Baronbarrach at the time of his death.”

JUDGMENT IN  
ORIGINAL  
ACTION.  
March 8, 1784.

At the advising LORD BRAXFIELD observed,—“No fraud here ;—the entail must subsist, but so as not to affect creditors. All debts contracted before recording infeftment must be good. This provided by the Statute 1685, and this agreeable to the principles of the feudal law of Scotland. A personal deed of entail cannot qualify a right in a person by charter and sasine ; 1751, Oliphant of Bachilton. But I incline to go farther. Prior to the Statute 1685, entails were in use ; but I doubt how far, by the common law, a proprietor could lay such extraordinary burdens. The Statute 1685 interposed to prevent such questions ; it lays burdens on the heirs of tailzie ; but nothing in the Statute which says that a man may tie up his own hands, possess the estate, and yet secure it from creditors ;—that is contrary to the nature of property ; and it would have been unlawful in the Legislature to do so. No one could make up a title to the entail, in case of the contravention of Mr. Agnew, the maker of the entail. A different case when the maker of the entail puts the fee in the heir, and reserves only a liferent. No difference that here a mutual entail ;—that good among the persons contracting with him ; but still the debts will be good *quoad* the creditors ;—this determined in the case of Barholm.”

OPINIONS.  
Hailes' Session  
Papers.

STEWART  
v.  
AGNEW.  
1822.

MONBODDO.—“ Have no doubt as to the validity of all debts prior to recording of the entail by infestment. Nor have I any doubt even as to posterior contractions, for the limitations of the entail are only against the heirs of entail. No man can possess an estate without being liable to debts contracted by him, unless there be a provision to qualify right. No matter that here a mutual entail ; that is merely a personal contract ;—however onerous, it will not affect creditors who contract on the faith of the records.”

JUSTICE-CLERK.—“ I cannot perceive the principle which distinguishes mutual entails from simple entails. An onerous consideration for making the entail will not alter the nature of the right ;—that may be a good obligation at common law to make the entail good, but will not affect creditors. All that they had to do was to look at Mr. Vans’ titles, which contain no prohibition or irritancy.”

In consequence of the above judgment, an Act of Parliament was applied for and obtained by Robert Agnew, for selling parts of the estate in liquidation of the debts, and sales were accordingly made to a large extent.

HOUSE OF  
LORDS’ REMIT.  
July 24, 1814.

In 1809 Robert died, and his eldest son thereupon succeeded to the estate in virtue of the entail. By minority and absence abroad, it was still competent for him to appeal against the above judgment, finding the estate of Baronbarrach liable for the debts of his grandfather at the time of his death. He accordingly entered an appeal, and on the appeal being heard, “ It was ordered that the cause be remitted back to the Court of Session in Scotland to review the interlocutors generally.” On the case coming back to the Court parties were again heard.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—The estate of Barnbarrach belonged to John Vans in fee-simple. By the deed of entail in question, the fee of the estate remained with him. He could not, therefore, consistently with the law of Scotland, do any act whereby to place his estate beyond the reach of the diligence of his creditors. The judgment of the Court, therefore, in 1784, finding the estate still affectable for his debts, was well founded.

PLEADED FOR THE DEFENDER.—Independently altogether of the Statute 1685, the entail in question having been executed for valuable considerations, and been duly published, it formed a valid interdiction and inhibition against the entailer at common law, so as to prevent him thereafter contracting debts to affect the estate. The entail having been executed for onerous causes, each of the heirs' substitutes became an onerous creditor under the entail, and so acquired a *jus crediti*. Infestment having been taken on the entail in 1775, the *jus crediti* of the heirs was thereby rendered real. Their right to the estate, therefore, became preferable to that of any personal creditor of the entailer, excepting those creditors whose debts were contracted prior to the date of the entail; and this exception arose not on account of the debts having been contracted prior to the entail, but on account of the entail itself recognising the validity of diligence to be led against the estate of Barnbarrach for payment of them, and binding the heir of entail under a penalty to redeem.

STEWART  
v.  
AGNEW.  
1822.

ARGUMENT FOR  
DEFENDER.

The Court adhered to the interlocutor pronounced on 3d March 1784.

JUDGMENT  
ON REMIT.  
June 2, 1818.

The defender having again appealed to the House of Lords, "It was ordered and adjudged that so much of the interlocutor of the Court of Session in Scotland, of the 3d of March 1784, as found generally that the estate of Barnbarrach was still affectable by the debts due by John Vans of Barnbarrach at the time of his death, be, and the same is hereby reversed; and the Lords find that such estate was affectable only by the debts of the said John Vans which were due at the time of the date of the deed of tailzie of the 29th day of December 1757, and which remained due at the time of his death, and such other debts of the said John Vans (if any) as had become real charges upon the said estate before the infestment of the 20th day of May 1775. And it is further ordered and adjudged, that the said interlocutors of the 2d day of June 1818, and the 26th of February 1819, complained of in the said appeal, be, and the same are hereby reversed. And it is further ordered, that the cause be remitted back to the Court of Session in Scot-

JUDGMENT.  
House of Lords,  
July 31, 1822.

STEWART  
v.  
AGNEW.  
1822.

land, to do therein as may be consistent with this finding, and as shall be just."

LORD ELDON, CHANCELLOR, observed,—“ The question which your Lordships have to decide in this case is, Whether the opinion of the Court of Session upon the remit of the interlocutor pronounced in 1784 is right ?

“ I have mentioned the opinions of Sir Ilay Campbell, afterwards President of the Court of Session, and of Messrs. Maclaurin and Crosby, two persons of great eminence in their profession, because they appear to me, together with the fact of a contract of tailzie of this sort being executed so long ago as the date of this contract, to imply that it was not at all understood at that time by conveyancers, and considerable lawyers, that a man could not (putting fraud out of the case) make a tailzie with irritant, resolute, and prohibitory clauses, that would bind himself, if the transaction was an honest transaction ; and if your Lordships refer to the judgment from which this is an appeal, you will find it to proceed upon an idea, that certainly had not got into the heads of any of the lawyers whose opinions I have stated, nor could, I think, have been in the mind of that conveyancer, whoever he was, who drew this mutual deed of tailzie, that it could not be done if it was fairly done, and for considerations that made it onerous. However, my Lords, afterwards the creditors adopted proceedings, with the assistance, as it seems to me, of Mr. Robert Vans Agnew,—I am afraid I should be justified in saying, he colluding, and, as the papers represent, having a very considerable interest himself, in making this entail subject to debts. John Vans Agnew had contracted debts, which, at the time of his death in June 1780, amounted to £11,000 and upwards, and had also granted bonds of provision to his younger children, which at his death amounted to £3000 and a fraction, besides interest and penalties, and two persons of the name of Stewart and Drew, as trustees for the creditors, thereupon led adjudications, and brought an action of reduction and declarator against Robert Vans Agnew and the other heirs of entail then in life, concluding that the entail should be reduced as far as related to the estate of Barnbarrach, and that they should be entitled to pursue all legal diligence against that estate, notwithstanding the entail.

“ The case came before the Court on the 3d March 1784 ; and there is, first, my Lord Braxfield’s opinion. He says, ‘ No fraud here ; the entail must subsist, but not to affect creditors ; all debts contracted before recording of infestment must be good ; this is provided by the Statute of 1685 ; and this is agreeable to the principles of the feudal law of Scotland. A personal deed of entail will not qualify a right in a person by charter and sasine.’ Here, your Lordships see, you have the great authority of Lord Braxfield, expressly stating that all debts contracted before recording infestment must be good. Then he goes on to state himself thus, not in the positive language in which he had stated that proposition, that all debts contracted before recording infestment must be good, but he says, ‘ I incline to go further. Prior to the Statute of 1685 entails were in use, but doubted how far, by the common law, a proprietor could lay such extraordinary burdens. The Statute of 1685 interposed to prevent such questions. It lays burdens upon heirs of tailzie, but nothing in the Statute which says that a man may bind up his own hands, possess the estate, and yet secure it from creditors ; that is contrary to the nature of property, and it would have been unlawful in the Legislature to do so. No one could make up a title on the estate in case of the contravention of Mr. Agnew, the maker of the entail ; it is a different case where the maker of the entail puts the fee in the heir, and reserves only a liferent ; no difference that here a mutual entail ; that good as to the person contracting with him, but still the debts will be good *quoad* the creditors—this was determined in the case of Barholm ;’ a case which your Lordships will recollect is very largely commented upon in these papers. My Lords, I think I may venture to say, from respect to the memory of Lord Braxfield, that it is impossible for him to have said that this was contrary to the nature of property, and that it would have been unlawful for the Legislature to do so. Improper it might have been, but not unlawful. Then he puts a case, which, if it be law, (which I apprehend it is,) certainly shows there is a means of doing all the mischiefs which are imputed to this entail. He says, ‘ It is a different thing where the maker of the entail puts the fee in the heir, and reserves only a liferent, and that in that case the entail

STEWART  
v.  
AGNEW.  
1822.

STEWART  
v.  
AGNEW.  
1822.

will be good in the heir, and he will only have a liferent.' Taking this to be the law, it is quite obvious that there is a way of so settling, as that the entailer shall only have the liferent, and the heir shall have the fee; the effect of that would be, that all those consequences, which are supposed to be so mischievous as to put men on another mode of entailing, may be consequent on the mode of entailing Lord Braxfield points out; but with respect to what he says, when he uses the words, 'I incline to go further,'—he does not go to the length of saying that he does go further. He says, 'Prior to the Statute of 1685 entails were in use;' (it is very extraordinary that in some of these papers we should have the assertion that entails were not known in 1685;) he says, 'but doubted how far, by the common law, a proprietor could lay such extraordinary burdens. The Statute of 1685 interposed to prevent such questions. It lays burdens on heirs of tailzie.' And here your Lordships will permit me to put you in mind how many cases we have had here, in which it has been determined that an institute is not an heir of tailzie; how many cases we have had here, in which it has been determined here, on the authority of the Court of Session in Scotland, that though an institute is not an heir of tailzie, and though he is never mentioned in the Act of 1685, if he be *nominatim* fettered, the fetters upon the institute are just as good as the fetters upon the heirs of tailzie.

"My Lord Monboddo says, 'I have no doubt as to the validity of all the debts prior to the recording of the entail by infestment; nor have I any doubts even as to posterior contractions, for the limitations of the entail are only against the heirs of entail.' If by that his Lordship meant that the limitations, however expressed, can only be considered as limitations against the heirs of entail, then I understand him; but the limitations of the contract, if you are to determine from the expressions in the contract, are express against the institute, that is, the maker of the entail, as well as against the heirs of entail. 'No man can possess an estate without being liable to debts contracted by him, unless there be a provision irritating the right. No matter that here a mutual entail, that is merely a personal contract; however onerous, it will not affect creditors who con-



tract on the faith of the records.' Now, my Lords, if this is an onerous contract, and if this onerous contract is itself upon the records; if it be duly registered and recorded; and if infestment has been duly taken upon it, then the lieges had just as good notice of this onerous contract so recorded, and of the steps which were taken, as they had of any other contract which is upon the record.

STEWART  
v.  
AGNEW.  
1822.

" Then the Lord Justice-Clerk says, ' I cannot perceive the principle which distinguishes mutual entails from simple entails. An onerous consideration for making the entail will not alter the nature of the right; that may be a good obligation at common law to make the entail good, but will not affect creditors. All that they had to do was to look to Mr. Vans's titles, which contain no prohibition or irritancy,' not regarding as binding upon him the prohibitions and the irritancies I have read to your Lordships. There is certainly a difference between an entail being good at common law, as affecting the persons to take under it, and as affecting or not affecting creditors: that, I apprehend, will depend upon the circumstances under which it is taken. They then find, ' that the entail subsists, but that it cannot affect the just and lawful creditors of Mr. Vans, and that the estate of Barnbarrach is subject to, and affectable by, the debts due by the said John Vans at the time of his death.' Your Lordships observe, that the debts described here are the debts, not which were due at the time the contract was entered into—not which were due at the time the contract was recorded—not which were due at the time the infestment was taken—but the debts which were due at the time of his death; it does, therefore, include every debt at the time the contract was entered into, and between that period and the time of his death.

" Now, my Lords, with respect to the question under consideration, it would be a waste of time for me to state to your Lordships all the contents of the papers upon the table. The principal objection the Court of Session have taken to the entail, as not being effectual against the creditors, such as were creditors at the death of John Vans Agnew, is, as the papers state, an objection founded on this sort of principle and reasoning,—that a man cannot fetter his estate as against himself;

STEWART  
F.  
AGNEW.  
1822

that the Act of 1685 enables him to fetter his estate by resolute, prohibitory, and irritant clauses, as against heirs of tailzie, but that he cannot do it against himself. My Lords, when we come to look at the reasoning why he cannot do it against himself, it is said that that Statute enables him to do it as against heirs of tailzie, but that it only enables him to do it as against heirs of tailzie ; to which it was answered, it is true that Statute was made to remove doubts, and to enable good and valid entails against heirs of tailzie ; but still that Statute could not alter what the law was with relation to provisions, as to others than the heirs of tailzie. And it has been repeatedly observed in this House, in the case of Duntreath and a variety of other cases, with which your Lordships must be familiar, that an institute, for instance, is not an heir of tailzie ; that the description of an institute is nowhere to be found in the Act of 1685 ; and yet you have very few questions whether the institutes are not bound, if you only bind the heirs of tailzie. The description frequently is, John such-a-one and the other heirs of tailzie, where John such-a-one was an institute. It is said that you cannot imply from those words that he was as an heir of tailzie meant to be fettered, because he is not an heir of tailzie. In the case of Duntreath, it will be in your Lordships' recollection, that expressions of that kind are to be found in various places ; ' the institute,' naming him, ' and the other heirs of tailzie ;' but when you come to look at the resolute, irritant, and prohibitory clauses, they are only on the heirs of tailzie, and though that man was called one of the heirs of tailzie, by the reference to the others as ' the other heirs of tailzie ;' and though it is said you cannot by implication fetter the man, but that he must be expressly named, yet if you find, as you have done over and over again, that if the institute is expressly named, he is as much bound as the heirs of tailzie, there does not appear to me to be, in that case, any difference between the institute and the succeeding heirs of tailzie. If your Lordships will look to what is to be found in Stair, in Hope, and in Mackenzie, it appears to me that the maker of the entail himself may be bound ; it is said he clearly may be, if the deed of tailzie is an onerous deed. It is very true, that after these cases, your Lordships will not hastily decide, that if

the deed was not an onerous deed he could bind himself, but if it be an onerous deed, made on sufficient consideration, notwithstanding all the reasoning I have seen, it does appear to me to be quite sufficient to support the obligations entered into. I say, such a deed will bind him if he sells the estate for money, and money constitutes the consideration. What is this, in truth, if you come to analyze it, but a sale according to the expression to be found in it? What is it but a sale made by John Vans to Robert Agnew for the consideration there mentioned? If they had thought proper to make a conveyance in another way; that is to say, if they had conveyed to Robert Agnew, for the consideration there mentioned, Robert Agnew might immediately by deed have created an entail, restricting most absolutely John Vans, as well as all other takers; and the question is, whether this is not in effect the same thing, considering the nature of the contract, and the other obligation which arises out of the consideration?

STEWART  
v.  
AGNEW  
1822

“ My Lords, I will only refer generally to the arguments on this subject. I could read all this book which I hold in my hand on the subject to your Lordships; but I do confess, after considering the arguments which have been addressed to us from the Bar, and on looking into writers, and reading these papers, I have a very strong conviction that, independently of that Statute of 1685, such a deed as this,—recollect, my Lords, I do not say a gratuitous deed,—but such a deed as this, proceeding on onerous consideration, and valuable consideration, not a mere mutual entail, but proceeding likewise on money considerations, is competent to bind him; that is to say, that he contracted a personal obligation to make this effectual, and that he did make it effectual by infestment; and though it appears to me the debts contracted, at the time the contracts were entered into, were personal obligations, yet if adjudications were led upon those debts before the infestment was taken, it appears to me they would be prior rights; but it does appear to me that adjudications led after infestment was taken would not be effectual as prior rights,—and that accords with the declaration of Lord Braxfield, to which I have drawn your Lordships’ attention. I should therefore propose, with your Lordships’ permission, to alter this interlocutor in the following manner:—

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2. At the advising Lord Esk-  
muu observed, "I am much

difficult, saying, make the decision in the case of *Shenstone*, and I do not see that it established law in every case. Clearly the Act 1685 applies not to the maker of an entail, but to heirs only; and if the fetters were laid only on the maker, it could not be registered in the record of tailors, or thereby have more effect than it had *ab initio*. The question is, Whether such a settlement as the present may not be good, independent of a Statute? The rule of law is, that no man can hold an estate which is not affectable by his debts, and therefore by the Act 1685 the right of the contravener must be resolved. Here there is a resolute clause. There are two other modes in which a man may tie up his estate against creditors. He may dispo-  
ne the fee, and only reserve a life interest, or he may interdict himself. A voluntary interdiction will

be effectual, even on false grounds, though a man be not so weak and facile as he calls himself. This Court must proceed on good grounds, but both interdictions equally effectual. I would incline to have a hearing in presence." LORD BRAXFIELD.—"If this were a new case, notwithstanding the urgency of circumstances, I would join your Lordships in wishing a hearing in presence; but the precise same point was determined in the case of Sheuchan. I was for the judgment then pronounced, and am still of the same opinion. Tailzies were no doubt made before 1685, and some of the largest estates in this country are held under these deeds; but the House of Lords have properly found (contrary to a judgment of this Court) that these entails are not effectual unless registered according to that Act, and no tailzie can be valid but upon that Statute. The arbiters here designed no doubt to bind up this young man, and they meant well; but they did not take the right way. They should have restricted his right to a liferent, for so long as he holds the property his debts must affect it. The other case of an interdiction the law allows to protect those who are weak and facile; but if a man prove himself otherwise, he may reduce that limitation of his right. Besides, a man's deeds, even under interdiction, are not set aside, unless lesion is proved. Another man may give me his estate under limitations, and I must take it *sub modo* as he pleases to give it; but if once the fee-simple is in my

person, no deed, while that remains, can cut out my creditors. The Act 1685 is the rule by which every entail is to be determined; but every line of that Act is repugnant to the idea of a person holding property not affectable by his debts. Accordingly, no prohibition to contract debt, nor even an irritancy of debt, is sufficient; there must at the same time be an absolute resolution of the right of the debtor. It is now trite law, that without a resolute clause no entail can be effectual against creditors. By the Act 1685 the next heir serves to him who was last infeft, passing by the contravener, that he may not be liable for his debts. This can never apply to the maker himself; for if you pass by his right, the right of the heirs must cease of course. This is the idea of the common law, sanctioned by the Act 1685. There is another idea—a man cannot bind himself to his own heir, so as to prevent him contracting debts, or granting other deeds; the heir, being *eadem persona cum defuncto*, necessarily becomes liable for his predecessor's deeds as his own. The same principle applies here as in testaments, *voluntas est ambulatoria usque ad mortem*. With respect to the submission here, William Dickson need not have entered into it but as he pleased. As to John Dickson's intentions I can say nothing, as he did not execute them. The decree-arbital makes no difference." LORD JUSTICE-CLERK MILLER.—"After recollecting the case of Sheuchan, and the principles, as now stated,

on which it proceeded, I am of the same opinion." LORD HENDERLAND.—"For the judgment in Sheuchan's case, and of the same opinion now. A man's property can only be secured from creditors in the two ways which have been mentioned." LORD HAILES.—"I would wish extract to be superseded, as this is a case of some difficulty and importance."

3. In the FACULTY COLLECTION the following note is given of the opinion of the Court:—"The Lords considered the entail to be altogether ineffectual in a question with the creditors of the entailer. The Statute 1685, authorizing settlements of that sort, related, it was observed, to the case of heirs alone, whose interest might, according to the forms therein prescribed, be limited or modified by the deed of the ancestor, from whose gift they derived the estate. But the case of the proprietor himself was left to the regulation of the common law. The maker of the entail in question might have restricted his right to a mere life-rent, or, by executing a bond of interdiction, he might have precluded his burdening the lands, unless for onerous or rational causes. These, however, were the only methods by which the order of succession marked out by him could be secured against his future contractions; the general rule being undoubted, that no man can, by any device, withdraw his estate from being liable for his debts."

4. In 1822, a substitute heir of entail brought an action of reduction and declarator for the purpose

of setting aside the sale to William Cunningham, as being made in violation of the entail 1776. The grounds on which the action was rested were, that the entail 1776 was an onerous deed, and that it was therefore incompetent for the entailer to sell any part of the estate; that the proceedings in 1784 and 1786, were collusive, irregular, in absence, and to the lesion of the parties having the true interest to oppose them, and that those heirs for whom appearance was made were creditors of the entailer, and as such had an interest to have the lands sold. The Court "Repelled the reasons of reduction, and assoilzied."—DICKSON v. CUNNINGHAM and MEDWYN, March 3, 1829.

5. The pursuer having appealed to the House of Lords, the judgment was affirmed, Oct. 1, 1831. The grounds, however, on which the affirmance proceeded differed from those adopted in the Court below. It was there held that the entail of 1776 was an onerous entail. In the House of Lords, LORD BROUGHAM, Chancellor, was of a different opinion. In delivering judgment his Lordship observed, "This case is one of the greatest importance and anxiety which I have ever been called upon to advise your Lordships upon since I have had the honour of holding my present situation. It is not that I have formed an opinion upon the subject with any great hesitation, or that I have found my way towards that opinion beset with any considerable difficulties; but it is because the opinion

I have formed, so far as it goes to sanction the judgment of the Court below, may at first sight, without due explanation, and without proper consideration of the particular grounds whereupon it stands, appear to shake in some degree one of the most important decisions that ever was pronounced in this Court of appellate jurisdiction in any case of Scotch law. The case to which I allude is commonly known by the name of the Sheuchan case, a case decided with the greatest deliberation; and I must say, I should indeed have taken a very long time before I could make up my mind to do anything that could throw discredit upon that important decision. I should indeed have found the path by which I arrived at any such conclusion beset by almost insuperable difficulties, and I should have been very far indeed from stating to your Lordships that I felt entire confidence in the conclusion I had reached. It therefore becomes necessary at present, and it is indeed the only task which now devolves upon me, to satisfy your Lordships, as I have satisfied myself, that the Court below might well decide this case as they have done, and that I may well advise your Lordships to affirm their decision without in the slightest degree affecting the law as determined in the case of Sheuchan.

6. "The question here is, as in the Sheuchan case, generally speaking, How far the person in possession and the owner of an estate in Scotland can so deal with it as to tie up himself, and to defeat

the claims of subsequent creditors, by any deed in the nature of an entail? It is to the different forms in which that general question may be put, and the different circumstances in which it may arise, alone, that I am now to call your Lordships' attention; because the other objections with respect to the title to pursue, the *res judicata*, and so on, I do not touch upon. This being the important ground, and this being the ground on which I cannot altogether agree with some of the Judges in the Court below, it becomes necessary for me, in protection of the decision of this House, to state my opinion at somewhat greater length than I am used to do when moving to affirm. My Lords, if I were to judge from what I see in print, I should certainly have been disposed to say, that the learned Judges in the Court of Session still adhered to the opinion which they maintained when the Sheuchan case came before this House. I should say, when I find so many of the learned Judges of the Second Division using the expressions which are reported, that they yielded a reluctant assent to that judgment. When I look to these observations upon the great and important question in the case, namely, whether the deed is onerous or gratuitous, when I find those learned Judges all with one voice saying that it is clearly onerous, and when I find that, notwithstanding it being an onerous deed, they hold that it is incompetent to exclude the diligence of subsequent creditors, it seems to

me a little difficult to take both of those propositions—both of those results together, and to allow them both to stand, and the judgment, which was the fruit of both, to stand, while the Sheuchan case remains unimpeached; because, that is as much as to say, that, be the entail ever so onerous, be it ever so little a gratuitous disposition, an onerous deed duly recorded, according to the provision of the Act of 1685, it has no power to tie up, against contracting debts *de futuro*, the institute or person to whom the fee is conveyed by the force of the provisions of the deed; and that, my Lords, is a proposition which I cannot go so far as to maintain, if I hold, as I am determined to hold till an Act of Parliament forbids me, to the Sheuchan case. Now, my Lords, that the Judges of the Court in Scotland have in considering this question hankered after the establishment of the doctrine they had laid down previous to the Sheuchan case being decided, I cannot entertain a doubt, for the reason I have now given; but this opinion of mine is very strongly confirmed by the treatment which I find was given by those very learned persons in the Court below to the decision pronounced by your Lordships, in that very Sheuchan case, after a very plain indication of the opinion of this House had been flung out by a noble and learned Lord, a member of this House. It certainly did so happen, that, when that case went to the Court below, the Judges remained pretty nearly of the same opinion

which they had held before, which I do not blame, nor do I commend; but I state it as a fact.

7. “When, therefore, I find so great a disposition on the part of the learned Judges to cling by the first decision in 1784 against the intimation contained in the judgment of the Court of Appeal on the first branch of this case, that fortifies me in the opinion I have expressed, that the judgment of the Court below in this case was all but intended as an impeachment of the authority of the judgment of this House in the Sheuchan case. I have tried all I can to avoid arriving at this conclusion. I have strained every point, so far as I could, consistently with a due regard to the truth of the case, and I have done so on account of my great respect for the Court below, to see whether I could discover that the learned Judges pronounced this decision, having a due regard to the authority of the Sheuchan case; but although, in express words, they do not set it aside, I cannot discover that it was possible for them to rest the present judgment upon the grounds whereupon they have rested it, and to have felt all along that they were not impeaching the decision of that case; and sure I am, my Lords, that if I simply, according to the former practice, moved an affirmance, without any reference to the Sheuchan case, that case would probably next year in the Court below be deprived of the authority to which it is clearly entitled from the great learning, and the extraordinary sagacity



brought to bear upon it, as it was on almost every case, for many years during the time that Lord Eldon and Lord Redesdale assisted your Lordships in this House. My Lords, this brings me to say one word more respecting the Sheuchan case upon its own merits. I find it stated in the able argument in the respondent's case—'The respondent is sensible of the difficulty which he has to contend with in maintaining this last plea in consequence of the judgment of this most honourable House in the well-known case of Sheuchan; and while he regards with the most unfeigned respect a judgment pronounced in the highest court of judicature, he at the same time with the utmost deference trusts, that if it can be shewn to be at variance with those principles of law which had been long considered settled in Scotland, your Lordships will not regret that an opportunity has occurred for its reconsideration;' the effect of which is this, that though the deed is onerous, (and they cannot maintain that it is gratuitous), yet admitting that it is onerous, they have a right to a judgment here, affirming the judgment below. Now, I perfectly agree with the learned counsel when he says that; and I feel no doubt that he is sensible of the difficulty he has to contend with in maintaining this last plea in consequence of the former judgment of this House, and he does not evade the point; nay, he reminds us of what Erskine says, that a judgment of this House is not an Act of Parliament—that

your Lordships, in deciding appeals, act in the character of judges, and not of lawgivers; that the House of Lords, in the same manner as a court of law, deals but with the particular case in hand, and that it cannot introduce any rules binding upon itself in another case. My Lords, I take that proposition to be admissible only with a qualification. The decision of this House is not of such binding force, any more than that of the Court below, as to preclude the House, in a case of precisely the same kind between different parties, taking a different view of the law, or of the inference, in point of fact, to which particular circumstances may lead.

8. "It is not correct to lay down as a general rule that a decision of this House on a matter presented to it in its appellate character is not binding upon it. The House is not bound by it as by a law, but it is its endeavour, as it is its duty, to decide consistently with former decisions, as it is the endeavour and the duty of every court to adhere to the same principles which it has before laid down—to favour rather than to exclude that which has been established, and always to preserve an uniformity of decision. If an error has been committed—if a slip has been made—if a plain oversight has happened—if in any way a mistake, either in conclusion of fact or inference of law, has been made, God forbid that this Court, any more than any other, should not be open to the reconsideration of the case, and, if manifest error has



been committed, to the setting it right. But it is equally true, that until it shall be shewn to be clearer than daylight that error has been committed in a decision which has been made, especially where time has elapsed, under the impression that a certain rule of law prevailed, and where a certain legal principle has been sanctioned by the decision of a court of competent authority, and parties have acted upon the faith of that being right, and property has been invested, and rights have been dealt with, on the presumption of that being law, it is clear that it would be wrong to undo all which had been done during the interval, for the purpose of reverting to a technical nicety and accuracy of decision. It might be a great deal more mischievous to regain the position which had been lost than to proceed on the rule laid down, though erroneously; and upon this principle it was distinctly said by Lord Mansfield, in a well-known case in the Court of King's Bench, that if conveyancers had for a great many years understood that which was drawn into question to be the law, it would be better that it should remain, even although somewhat in error, if it was considered to be a settled rule of law, and not be shaken for the purpose of making it better than it had been. So much, my Lords, with respect to the authority of the decision, barely as a decision; but I have said, if there should appear to be a manifest error, the setting that right could not be attended with any great evil. Under such circum-

stances it is fit the case should be reconsidered, and the former decision, which had been of binding force, rectified; but, my Lords, having well known the *Sheuchan* case formerly—having assisted in arguing cases which were affected by it—having assisted in advising on cases in which the authority of that case came in question, and having since given it more consideration—having thoroughly investigated the particulars of it, and the grounds of decision in which the Court here differed from the Court below—I am clearly of opinion that it is not more to be respected out of a consideration for the very learned persons who advised your Lordships at the time than it is to be respected for the reasons in the judgment—the irrefragable reasons of Scotch law, distinctly Scotch law—the purely technical reasons, as well as the general reasons and principles on which my learned predecessors rested it.

9. “Now, my Lords, as it is fit I should fairly state to your Lordships the opinion I hold upon the present occasion, the greater or less degree of importance of which I must leave to your Lordships’ consideration, I can see no warrant in the Scotch law authorities, either the text-writers to whom Lord Eldon refers or the decisions—I am talking now of courses of cases prior to the *Sheuchan* case, for I am dealing with the grounds of the decision in that case—I see no warrant from any of those cases, no authority, nor any principle arising out of the matter itself, to

authorize such a proposition as this, that the owner of a Scotch estate, possessing it in fee-simple, can do any act of this kind, whereby he can, without consideration, gratuitously, voluntarily, and without any party being in existence who is otherwise than as a volunteer with respect to him, tie it up so as for the future to hold in himself the apparent ownership of that estate, while he excludes from any recourse against that estate the creditors with whom he, subsequently to that Act, and as if dealing with the property, shall contract debts. I can see no warrant in the Scotch law to entitle me to hold with those learned persons, that if the deed was done gratuitously, which is the proposition they at first laid down, without any onerous consideration at all, and all parties claiming under him being volunteers, he can thus defeat subsequent creditors. It is perfectly true (I admit to those learned persons whose opinion I am taking the liberty, with great humility, to sift) that there are in the Scotch law two records provided by the Act of 1685, the one of which was introduced by the Act, and the other existed before; and by registering the title, and availing himself of the old record and the new record provided by that Act, he could validly divest himself of the property altogether; so it may be said he may divest himself in a qualified mode, and continue to hold that power which he reserves to himself, though not by way of *liferent*. I do not conceive that it signifies whether it is

by *liferent* or in fee; but if he may hold it in fee, and yet be tied up from contracting debt, so that those with whom he contracts debts shall have no recourse against that estate, it may be said *caveat emptor*; it was the lender's own fault that he did not go to the register; he might have seen in the Register of Tailzies that this property was tied up, that this man was not safe to lend money to, and that the estate was not his to borrow upon. But, my Lords, there is in the system of all countries, there is in our law, this,—that though a gratuitous sale may be binding as against volunteers, yet it cannot stand for a moment against onerous creditors. And so of a bond being personal. Nevertheless a man had as just a right to bind his personal assets as his estate; that is the only difference in the two cases. It may be said, that the deed being registered, it is their own fault; but no court of justice can sanction such a principle; for though the Register exists into which, past all doubt, a man may look, and though it is stated in the second opinion of Maclaurin, (and it is a singular fact,) that bankers are in use to have in their possession, and to hang up for a constant and easy reference, lists of all tailzied estates, in order to see under what prohibitions and restrictions persons hold their property, and to take care not to lend their money where they may incur risk, yet what are poor tradesmen to do who see a man in the possession of property; they cannot be expected to go to the Register

Office every time they receive an order to furnish any article for the household ; every little dealing of that kind cannot be suspended till they send to Edinburgh to the Record Office to see whether it is safe or not ; and yet people always look to the landed estate, as ultimately to come in with the personal estate for their security. It is pretty well known whether a man is heir of entail or not ; but a man would be able, if the law was such as Maclaurin and Crosbie conceive, to commit very great frauds. It is quite sufficient for me to say there is no authority for that ; it is quite sufficient for me to say this is not now meant to be laid down as law ; and as regards the Sheuchan case, that not only it gives no authority whatever to this proposition, but the greatest pains are taken throughout the decision to rest it upon the circumstances of the case. I do not mean to say that it is a case going on specialties ; it goes on the broad ground of the transaction in question being most onerous. It is not necessary to go into Lord Eldon's observations upon the subject, in which again and again he most explicitly says, 'that whoever it be that drew the deed, there was no doubt it must be taken to be onerous ;' then he states in the most anxious manner, guarding his decision repeatedly, 'I have a very strong conviction that, independently of that Statute of 1685, such a deed as this, (recollect, my Lords, I do not say a gratuitous deed, but such a deed as this,) proceeding on an onerous con-

sideration, and valuable consideration, not a mere mutual entail, but proceeding likewise on money considerations, is competent to bind him ;' and so he goes on throughout. The Sheuchan case was considered to be distinctly decided on the ground of its being an entail for an onerous consideration, and the facts I have adverted to shew that the estate is one in which, against all subsequent creditors, he takes a fee—in which a series of heirs of destination afterwards take fees in succession—tailzied fees, according to the Scotch law of entail. My Lords, I have felt it to be necessary for me to comment at some length upon the Sheuchan case before I came to the present, because otherwise the consistency of the two decisions could not be so well seen.

10. "I perceive that there was an attempt in the Sheuchan case to exclude the diligence of the prior creditors, and it is perfectly clear that that was the intention of the parties ; for if you look at the date of the deed you will find that they were all excluded, just as much as the subsequent creditors ; 'that neither the said John Vans and Margaret Agnew, nor any of the other heirs and members of entail aforesaid,' (John and Margaret were, however, not heirs of entail but institutes)—'who shall take or succeed to the said lands and estates by virtue of these presents, shall suffer or allow any special adjudications to pass against the said lands and estates, or any part thereof, for payment of the debts of the said John

Vans contracted before the date hereof, or for payment of the real and legal burden payable furth of the said estates, or for payment of any other debt to which the lands and estates may by law be subjected in any time hereafter.' Now it is perfectly clear that this was only a personal obligation against the parties; that it could not be suffered to have the power of barring the prior debts, but that these were recoverable in spite of it; nor does the authority of the learned President, Sir Ilay Campbell, at all sanction the notion of their being barred. My Lords, I have stated the great respect I feel for the noble and learned Lords who decided the Agnew case, and who stated the reasons on which their decision was supported; and I shall not be charged with the least insensibility to the value of that authority, or the value of those reasons, when I say, that if there is any one part of that case on which I entertain a doubt, it is on the question whether the Agnew entail and the Vans entail were properly fenced, as against the institute, by irritant and resolute clauses. There may be some doubt—possibly they were not properly fenced; and Lord Eldon's judgment having, as very often happens, been directed much more to the main body of the opposite arguments, possibly his Lordship did not sufficiently attend to the only ground upon which, in my humble judgment, there could be any question. He

has not decided that point, and in the decision in the Court below the Judges do not appear to have dealt with it. I take the decision, however, to have been right, even upon that on which alone I feel any doubt. As to the main point of law, and that called the principle of the Sheuchan case, I entertain no more doubt, as far as my opinion goes, than upon the subject of any of the most unquestionable principles of Scotch law. I therefore once more say, that though I cannot agree with the learned Judges in the *rationes decidendi* of the present case, and in the doubts which those reasons cast upon that of Sheuchan, yet I concur in the conclusion to which they have arrived; and it is a great satisfaction to me to know that Lord Eldon, who attended in the course of the argument and heard a great part of it, having come down because he understood that the Sheuchan case was to be questioned in the course of this, went from hence with the conviction that the two decisions could well stand together. That is the impression left upon my mind by the conversation I had with the noble and learned Lord. I now move your Lordships that the interlocutors be affirmed."

11. The ground upon which it was held in the House of Lords that the estate of Barnbarrach was affectable by the debts due by Mr. Vans the entailer at the date of the entail, was, that from the terms of the entail, it appeared to have been the entailer's inten-

tion that for those debts the estate should remain affectable, although not so for those subsequently contracted. LORD ELDON, after reading the clauses in the entail, observed,—“ Your Lordships will therefore observe, that there is a distinction made as to adjudications, apprisings, and diligence for debts of John Vans and Margaret Agnew, contracted prior to the date of the deed, from those contracted by any other of the heirs and substitutes of tailzie, either before or after their succession to the land and estates.” On the same point LORD REDESDALE also observed,—“ The deed itself provides that the debts which he then owed the settlement should not affect, so that the deed was so far an honest deed ; that it was intended that all the debts he then owed should be a charge against the estate ; but it provided, by the usual clauses for that purpose, that debts subsequently contracted by him should not affect the estate.”

12. The judgment of LORD ELDON, in the case of *STEWART v. AGNEW*, decides that an entail in which the prohibitions are directed against the entailer as well as against the substitutes, will exclude the creditors of the entailer if it has been granted for an onerous cause. This was all which it was necessary for Lord Eldon to determine, as he was clearly of opinion that the entail in question was an onerous one. He accordingly, with his characteristic caution, scrupulously avoided pronouncing any opinion on the effect

of a gratuitous entail in a question with the entailer's creditors. No opinion, either, has ever been pronounced by the Court upon that point, for the Court were clearly of opinion in the case of *Stewart v. Agnew*, and also in the case of *Dickson v. Cunningham*, that a party holding an estate in fee-simple could not—even for an onerous cause, by an entail upon himself and a series of heirs, place his estate beyond the diligence of his creditors. The ground of this opinion was, that the Act 1685 did not contemplate a party entailing his estate against himself, and that therefore such an entail was not sanctioned by the Act. This difficulty, however, being removed, were it not for the judgment of Lord Brougham in the case of *Dickson v. Cunningham* and *Medwyn*, it might perhaps have been thought that a gratuitous entail even was effectual against the creditors of the entailer, whose debts were not made real prior to the date of the infeftment following upon the entail, provided the entailer was solvent at the time of executing the entail. It is admitted that at common law a party, provided he be solvent, may gratuitously convey his estate to another, either absolutely, or under reservation of a liferent merely. The judgment of Lord Eldon establishes that he may accomplish a similar result in the form of an entail, provided it proceed upon an onerous cause. But if the disponee in a gratuitous disposition under which the granter reserve

his liferent, and upon which infestment has followed, thereby acquires a *jus crediti* which cannot be defeated by the creditors of the granter, it might perhaps have been thought that the circumstance of onerosity in an entail was not essential to render an entail effectual against the creditors of an entailer, provided he were solvent at its date. A contrary judgment, however, has been pronounced by LORD BROUGHAM, although the point is one on which the Court itself has never delivered an opinion.

13. Some of the lawyers who were consulted on the validity of the Sheuchan entail, were of opinion that the onerosity of the entail was an immaterial element in the consideration of its validity. In the Opinion given by Mr.

Maclaurin and Mr. Crosbie, they observed,—“ We think the entail would be considered as an onerous deed for several reasons. But whether the entail was onerous or gratuitous does not appear to us to be material; for there was nothing to hinder Mr. Vans to convert the fee-simple that was in him into a tailzied fee, and that was done by the entail in question. After infestment was taken upon that entail, and recorded, and the tailzie itself recorded in the Register of Tailzies, no debt contracted by Mr. Vans could be effectual against the estate; but all debts contracted before execution of the entail, and not only these, but all contracted before registration in both registers, (for the law requires two publications,) will be effectual.”

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*Where the Heir of Investiture makes up a title to the Estate to the exclusion of a Disponee under a preferable personal title, rights granted by the Heir, and made real before the Disponee has established his preferable Claim will be good against the Estate, although the right of the Heir should afterwards be reduced.*

#### HERON v. STEWART.

JOHN STEWART, by his contract of marriage in 1668, bound himself to provide the fee of all lands that he then had, or which he should acquire during the standing of the marriage, to the heirs of the marriage. In 1703 he was infest in

May 30, 1749.

NARRATIVE.

the estate of Physgill. In 1711 he executed an entail of that estate in favour of himself and the heirs-male of his body: whom failing to the heirs-male of their bodies: whom failing to the heirs-female of his own body, and the heirs-male of their bodies. Upon this entail he was noted by charter under the Great Seal.

There were four sons and four daughters of the marriage. David the eldest predeceased his father unmarried without issue. Robert the second likewise predeceased his father, but left one daughter, Agnes the defender. The marriage was dissolved in 1719 by the death of John Stewart. On his death his third son William was served heir of tailzie, and infeft. In 1727 William died without issue, and as the fourth son had also died without issue, Agnes, the eldest daughter of the marriage, succeeded as the nearest heir of tailzie, and possessed the estate till 1732 when she also died without issue.

In 1725, while the estate was possessed by Agnes, John Coltrain of Drummovall, a son of Elizabeth, the second daughter of the marriage, bound himself in his marriage-contract to infeft his wife in an annuity of 900 merks Scots, in the lands of Physgill, should he at any time during the existence of the marriage succeed to these lands.

Upon the death of Agnes in 1732, John Coltrain was served heir of tailzie to his aunt, and in 1734, upon a recital of his contract of marriage, he granted a precept for infefting his wife in the lands of Physgill, in security of her liferent provision of a fourth part of the free rents of the said land. Mrs. Heron was accordingly infeft upon this precept.

Agnes, the daughter of Robert, the second son of the marriage, then brought a reduction of the deed of entail executed by her grandfather, in 1719, as being contrary to the provision of his marriage-contract in 1668. The Court reduced the entail, and the judgment was affirmed by the House of Lords.

Captain Stewart, formerly called Coltrain, was killed at the Battle of Preston in 1745, and his widow brought an action of mails and duties against the defender for payment of one-fourth of the rents of the lands. This action was resisted by the defender, on the ground that the pursuer's husband had



never any right to the lands, and that, therefore, the infestment granted by him to the pursuer was null.

HERRON  
v.  
STEWART.

1749.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—An heir of provision in a contract of marriage is not entitled, as a creditor in such provision, to reduce onerous deeds granted by the father, who is the maker of the provision. By the same rule, all onerous purchasers or contractors with any of the heirs of the maker of such provision are safe. A sale, therefore, by the heir of the investiture, who has made up a proper title to the estate, cannot be impeached. He is *una et eadem persona cum defuncto*, and therefore his onerous deeds are equally effectual in questions with the heir of provision as if they had been granted by the maker of the provision himself.

The maxim, *Resoluto jure dantis jus accipientis resolvitur*, is quite misapplied by the defender in the present case. The maxim applies to the case only where the author's right falls by the granter of the right satisfying it according to the terms expressed in the right. Thus where a wadset is redeemed, the right flowing from the wadsetter must cease, because the contractors with the wadsetter are certiorated by the record that such would be the case. But if the reversion is not incorporated in the body of the right, or, if apart, it is not duly recorded, the onerous purchaser from the wadsetter would be perfectly safe. The reverser, it is true, would, in such a case, have a good right to redeem from the wadsetter or his heirs; but if the terms of the reversion were contravened by selling the lands, the reverser could have no claim against the singular successor. He could insist only in a personal action against the wadsetter or his representatives for damages.

The defender's case is by no means so strong as that now supposed of an unregistered reversion. Her personal claim, therefore, upon the provision in his grandfather's contract of marriage 1668, could only have afforded action for damages against William Stewart's heir of the investiture by the infestment 1703, if he had sold the estate. But her claim on that provision could not have afforded her ground to challenge the purchaser's right. No more can she, upon that title, challenge the onerous disposition granted by William Stewart to the

**REPLY** pursuer. An heir of provision in a contract of marriage cannot have a better claim to the estate provided in the contract than one who has a direct obligation from the far in the estate to convey it in his favour for a price truly paid. The title of an heir of provision is not more strongly favoured than that of a purchaser by a personal minute of sale. But a second purchaser first infert would be preferable to the first purchaser, who had only a personal right by the minute. The pursuer is in the same position as a purchaser infert. At the time of granting her liferent provision, her husband was in full possession of the estate, and the property was legally and completely vested in him. Notwithstanding, therefore, that the entail has been reduced by reason of the personal contract of marriage, that reduction cannot affect the pursuer's right, who claims under a deed granted by John Stewart at a time when his title to the estate was impeached. Property would be extremely precarious if purchasers claiming under such as have an apparent clear legal title should be affected by latent personal obligations.

**ARGUMENT FOR  
DEFENDER.**

**PLEADED FOR THE DEFENDER.**—Supposing the pursuer to be an onerous purchaser from John Stewart, his right is necessarily evacuated, because John Stewart's right to the estate has been reduced. *Resoluto jure dantis resolvitur jus accipientis*. The records cannot secure against every defect. If a disposition should be elicited by fraud, or extorted by force, and thereafter completed by infertment, and a liferent provision granted by the disponent, it would be liable to be set aside. Upon the reduction of the disposition, the subaltern rights would fly off although there was nothing upon the records to certify the flaw and defects in the original right. For such extraordinary emergencies as these, parties must rely upon their author's warrandice. An innocent party thus brought by a fraudulent contrivance of the kind supposed, must not be cut out of his just right.

The tailzie 1727, which was Captain Stewart's only title to the estate, was *ex facie* a voluntary gratuitous settlement, and as such was reducible both at common law and upon the Act 1621, as a fraudulent gratuitous deed in favour of a conjunct

and confident person, without any just and necessary cause, and in prejudice of a prior lawful creditor. Wherever the original right appears, *ex facie*, to be gratuitous, where the relation betwixt the parties appears upon the face of the deed itself, or where the right is of such a nature that it must of necessity be gratuitous, as a settlement by way of tailzie, third parties purchasing from such gratuitous disponees, or from such conjunct and confident persons, are understood to be *in mala fide*, and so takes the hazard of their author's warrandice. Although the right, therefore, had gone through ever so many hands, the reduction of the original gratuitous right would affect all the purchasers.

HERON  
c.  
STEWART.  
1749.

The Lords Found, "That the obligation entered into by John Coltrain of Drummovall, afterwards John Stewart of Physgill, in the marriage-settlement between him and Mrs. Christian Heron the pursuer, whereby he was bound to settle upon her a liferent to the extent of £50 sterling yearly, was onerous upon the part of the said Christian Heron, and rational on the part of the said John Coltrain, *alias* Stewart; and that he having implemented the same, by granting the liferent infestment to that extent, when he was in the right of fee and property of the estate of Physgill, and his right subject to no challenge from anything that could appear upon the records, that infestment was likewise just and onerous, and does subsist in her favour, notwithstanding the reduction afterwards brought against the right and title of the said John Coltrain upon the latent personal obligation contained in the contract of marriage entered into in anno 1668, between John Stewart, writer in Edinburgh, and Agnes Stewart, his spouse, whereby he was bound to settle the estate he should acquire in favour of the heir whatsoever of the marriage, and notwithstanding the decree obtained in that reduction setting aside the right of the said John Coltrain, which the Lords found cannot hurt the said onerous liferent-settlement made to Christian Heron, the pursuer, by her said husband, while he stood in the full right of property of the estate, conform to the infestments and investiture thereof."

JUDGMENT.  
Feb. 22, 1749.

The defender having appealed to the House of Lords, it was



HERON  
v.  
STEWART.

1749.

JUDGMENT.  
House of Lords,  
May 30, 1749.

Ordered and Adjudged that the interlocutor complained of should be Affirmed.

LORD KILKERRAN, in reporting the case of HERON v. STEWART, observes,—“An interlocutor so full, that it in a great measure points out, and at the same time obviates the arguments pleaded for the defender from the common law and Act 1621. As to the common law, the maxim that *resoluto jure dantis resolvitur et accipientis*, holds only in three cases:—1<sup>mo</sup>, In extinguishable rights; 2<sup>do</sup>, Where the third party prevailing against the author has the preferable feudal right; or, 3<sup>tio</sup>, Where the author's right is intrinsically null, against which the records cannot save; as where his service happens to be erroneous. But the present case is different, where the feudal right was habily vested in the

author, and only subject to a personal challenge; for then the purchaser on the faith of the record is safe. And as to the Act 1621, though it is true that the acquirer is *particeps fraudis*, where he sees the defect of his author's right, yet that was what the pursuer could not see in this case. For though she saw her author's right from his grandfather to be a gratuitous settlement of succession, yet she could not see anything on record to hinder the grandfather to make that settlement, as he stood in the absolute right by the charter and infeftment 1703, and that his obligation in the contract of marriage 1668 was a latent deed which she nor any purchaser could know of.”—*Kilkerran's Decisions, voce Personal and Real.*

## II.—CALDER v. STEWART.

Nov. 18, 1806.

NARRATIVE.

In 1692 Daniel Calder was infeft base in the lands of Strath-  
In 1720, in his marriage-contract, he conveyed these lands to  
his wife in liferent, and to the children of the marriage in fee.  
Infeftment followed on the contract in favour of the wife. The  
eldest son of the marriage died in 1800 without making up an  
title. In 1801 the eldest son of the second son of the mar-  
riage, before making up a title, sold the lands to the defende-  
He then expedie a general service to his grandfather Dan-

Calder, and thereafter obtained a confirmation of his grandfather's base infetment, and a precept of *clare constat* as his heir-of-line, on which he was infest.

CALDER  
v.  
STEWART.  
1806.

In 1804 the daughters of Daniel Calder, founding on the marriage-contract 1720, brought a reduction of the title made by their nephew, and also of the conveyance by him to the defender.

LORD HERMAND, Ordinary, June 19, 1805, pronounced the following interlocutor:—"Finds, That whatever may be the case with regard to sums of money, or small burgh tenements, taken to the children of a marriage, yet, in landed estates of considerable extent, the law of primogeniture must be understood to take place: Finds, That the lands of Strath and others, provided by the marriage-contract 1720, to Elizabeth Sutherland in liferent, and the children of the marriage in fee, were descendible to the eldest son of the marriage, in which view the representatives, the daughters or grand-daughters of Daniel Calder, have no interest to pursue; *Separatim*, Finds that the respondent cannot be affected by the terms of a marriage-contract, dated so far back as the year 1720, upon which no infetment ever followed, *quoad* the fee of the lands, though infetment is said to have been taken in security of the wife's interest."

INTERLOCUTOR  
OF LORD  
ORDINARY.

The pursuer having reclaimed, the Court "Recalled the interlocutors of the Lord Ordinary, in so far as they find the fee of the lands in question was provided by the contract of marriage to the eldest son, and not to the whole children of the marriage: Find it unnecessary, in *hoc statu*, to determine that point: But in respect that the provision was only personal, Find that it is not sufficient to set aside the *bona fide* purchase of the defender, William Stewart, from the heir, whose titles were duly completed, and, *ex facie*, unexceptionable: Sustain the defences, repel the reasons of reduction, assoilzie the said defender, and decern; reserving all questions between the heir and the younger children."

JUDGMENT.  
Nov. 18, 1806.

1. In reporting the case of *CALDER v. STEWART*, Baron Hume observes, — “ When the papers came to be advised, the Solicitor-General (Mr. Blair) made this brief statement of the case from the bar: ‘ A clear point of law. Stewart purchased from a person who, though not served at the time, was soon after served and infest, in connexion with the last investiture, descendible to heirs whatsoever. ’Tis objected,—a latent contract of marriage descending to other heirs. Reply—I have nothing to do with such personal contract, more than with personal tailzie. True—was an infestment on contract, but one in liferent only, which Stewart was not obliged to look into, or make inferences from it at all.’ On that ground the Lords unanimously adhered.”—*Baron Hume’s Decisions*, p. 442.

2. *BARON HUME* has also appended to his report of the case, *Calder v. Stewart*, the following commentary on the law of Personal and Real. He observes,— “ This judgment is a confirmation of a well-known and an important principle of our ancient and common law, which is taken notice of in all our books, but is perhaps in most of them not so fully illustrated or explained as it ought to be, viz., that a feudal investiture is not liable to be defeated, qualified, or abated, by any condition or obligation that is not incorporated in the texture of the owner’s infestment; and that all such obligations or conditions are therefore ineffectual in a question

with an onerous and *bona fide* purchaser from such feudal owner. That such was the law, before the date even of our oldest collections of decisions, or the establishment of any record of feudal rights, we have decisive evidence in the Statute 1469, c. 28, which innovated on that point of the common law, in the case of a separate letter of reversion, granted by one who was infest *ex facie* in the irredeemable property of lands. If such apparently absolute owner sold the lands, the reversion was, by the common law, of no avail against the onerous and *bona fide* purchaser. But the Statute altered this condition of things to the prejudice of the purchaser, and made him equally liable as his author to redemption. Now, there would have been no need of any such statutable interposition in favour of the reverser, if he could have had recovered of the lands in the course of common law. This rule of our practice seems to be derived from natural principles, applicable alike to the property of land and of the *ipsa corpora* of moveable. In the case of a moveable *corpus*, of which the owner is in the real possession, let him have come under what contracts he may with respect to the use or disposal of this thing, still none of these engagements, not followed with delivery of the *corpus*, divests him of, or at all impairs his natural power over, and command of the thing, or can hinder the ordinary effects in law from ensuing on his exercise of that power. The *corpus* is still under his hand; he can

make delivery of it to any one under contract of sale; and if he do so deliver it, the purchaser thereby becomes owner of the *corpus*, and has nothing to do with his author's promises or engagements respecting it, of which he knew nothing, and about which he was not bound to inquire. These are the personal concern of his author only, who made those promises, and his heirs. The purchaser does not represent his author; he is an independent manager, who stands on his own ground, as singular successor in the real right, or *jus in re* of the *corpus*; which right was not intrinsically limited or altered in his author by his personal engagement, and has now passed pure and unqualified from him to the party who bargained with him as the owner, having power and in possession.

3. "The same principle equally applies to the case of an immovable tenement vested in any one by charter and sasine, which are the feudal delivery of land, and, in our practice, stand and are accounted for possession and natural power, and equally as these bestow the right of disposal. The feudal owner may have come under engagements with respect to the disposal of his property, or he may have granted back-bonds and separate obligations, in abatement or alteration of the quality or condition of his interest in the lands; but unless incorporated and exhibited in his investiture, these do not efface or at all modify or impair his real connexion with the subject, as established and vouched

by his documents of feudal right, the charter and sasine. They are extrinsic thereto; they are *extra corpus* of the investiture of property; they do not take away, or at all touch the power naturally incident to the state of real connexion with, and actual command over the thing. If the owner in-fest shall sell, or feudally encumber the land, the onerous and *bona fide* buyer or creditor has thus the feudal right transferred into his person, pure and entire, as the owner had it; and with the personal obligations of his author he has no sort of concern; these concern the party-granter only, and his heirs, who represent him.

4. "But farther, these opinions, drawn from natural principles, are recommended also, and powerfully confirmed, by the high convenience and equity which attend them in this interesting branch of business, and which are the foundation of our whole system of registration of feudal rights. To render this class of transactions sure, easy, and commodious, had long ago, and with great reason, become a favourite object with our Legislature; and they proceeded, in a uniform and progressive course of policy, to frame for that purpose a series of salutary and consistent ordinances, for the publication by record of the several modes of feudal interest and title. Now it would obviously be subversive of the objects of those wholesome laws, and would tend to ensnare instead of defending a purchaser, or lender of money, if it were held that an instrument of sasine, re-

corded though it be, is still liable to be qualified, circumscribed, or abated by transactions of which it gives no sort of warning. The purview and principle of this system are directly the reverse, and quite in unison with our native common law, that the right of the person infeft, and his powers over the subjects, shall be held to be just such as they are exhibited on the face of his charter and sasine, and nowise different or lower; and that, in this belief, a purchaser or creditor may best secure, and confidently arrange his transactions with the owner. It is easy to imagine illustrations of this principle, and judgment has been given accordingly in several instances.

5. "Put the case, that being feudally vested with the fee-simple of his estate, John executes a settlement of it by a strict deed of tailzie in favour of James, his eldest son and heir of line. James neglects the entail, and is invested in the fee-simple of the lands by special service, and infeft as his father's heir of line. Certainly, James does wrong in thus infringing the obligation he is under to make up his title in terms of his father's tailzie. But this is matter of obligation on James, and nothing deeper; it is no intrinsic qualification of, or inherent burden on, his own feudal investiture in fee-simple, which is made up in regular connexion with John's own investiture, the last on record. The consequence is obvious. If, before any challenge moved, James proceed to sell the lands to William, who buys *bona fide* and pays his

price, William is secure of his purchase; the heirs of entail have their remedy by personal process of damages against James, and all who represent him. The like plea would equally defend James' creditors affecting the lands with diligence, in contempt of the tailzie, for payment of his debts. So it was found in such a case 31st January 1792, *Russell v. Creditors of Ross*. So it had likewise been found, in 1765, in the case of the creditors of Douglas of Killhead. Again, put the case, (near to that here reported), that on his contract of marriage a person destines and provides all heritages he shall acquire pending the marriage, to the children of this marriage, male and female, equally among them. He afterwards acquires lands, but takes conveyance and investiture of them to himself, and the heirs-male of their marriage only; and so he dies. In connexion with this investiture, his eldest son is invested by service and infeftment as heir-male of provision to his father, and being so invested, he sells the lands. This stranger purchaser is nowise affected by any challenge which may afterwards come at the instance of the daughters or younger children of the marriage. He bought the lands in reliance on his author's recorded title, duly connecting with that of his father, also on record. The contract of marriage, not followed with infeftment, was no real or intrinsic qualification of the father's fee of the lands. It was latent and personal only, the



concern of the father and his heirs, and nowise of the stranger, who was no party to any such engagement, and does not represent any one who was a party. This is the principle of the noted judgment in February 1749, *Christian Heron v. Agnes Stewart*, reported by *Kilkeran*, (p. 389, *Personal and Real*.) In that instance the son's widow, infert for her liferent annuity in pursuance of an antenuptial contract of marriage, was justly regarded as an onerous and *bona fide* purchaser of that annuity, on the faith of her husband's recorded investiture, and as nowise liable to be affected by the subsequent reduction thereof, as *contra fidem tabularum nuptialium*. The present case of *Calder v. Stewart*, though different in some particulars, rests on the same principle; and the like law was again applied 12th February 1811, in the case of *Campbell v. Campbell*.

6. "Take in farther illustration, the case of lands vested in any one *ex facie* in absolute property, but truly held in trust for his author, the disponent, who has been content with the deed of his separate back-bond of trust. The conclusions of a declarator of trust cannot reach any onerous and *bona fide* purchaser from such a one, who has acquired before any such declarator was raised. The truster, when he disposed in such terms, relied on the personal faith and integrity of his own disponent, and, *sciens et prudens*, put it in his power to be false to his trust if he would. He has been deceived, it is true, but the purchaser

is not *particeps fraudis*. He only takes the *jus in re* of the subject, such as his own author had it, and such as the former owner himself had rashly, but willingly, put it into his hands, in a ready condition for the market. The difference lies in the personal obligation, which attaches to the one party and not to the other. In such a case, that of *Thomson v. Douglas, Heron, & Co.*, 15th November 1786, the Lords sustained an heritable security given by the trustee for his own debt. The same principle had been applied long ago in favour of a purchaser of the property from one who had it only in trust, 14th November 1702, *Anderson v. Dudgeon*, (Fountainhall.) See also 20th July 1715, *Fergusson v. M'Cubbin*, and even though in that instance the right had been acquired at first in a personal state, and was only feudalized in the purchaser's person.

7. "The like law would apply to the case of lands truly purchased by James for, and on a mandate from, John, but which the seller conveys, agreeably to John's own directions, in pure and absolute property, to James, from whom John takes a private declaration of trust. Here the third person, who ignorantly buys the land from James, and pays its price, has a good defence against any challenge at the instance of John. In these circumstances, there is no fundamental or inherent defect of real right on the part of James. He has an absolute investiture on record, proceeding on the act and consent of the last owner and seller

of the lands, and this consent given with the privity of John himself, the party who now pretends to challenge. But John cannot challenge as null and void—as vitious and hollow—an investiture of his contrivance, and which is carried into execution in pursuance of the previous concert with himself. He trusted throughout to the honesty of James, and he must seek his amends from him, or those who are responsible for his personal obligations. What is not so favourable, and was formerly reckoned doubtful, the same principle has been applied in later times, in favour even of a trustee for personal creditors, infest under a judicial sequestration of their debtor's estate. It was found in the case of *Duncan v. Wylie*, 8th December 1803, that such a trustee, who is as an adjudger for the common behoof, *non utitur jure auctoris*, in all respects, does not take up the bankrupt's interest in the lands *tantum et tale* in all points as it stood in his person, and subject to a latent right of redemption, but takes the estate absolutely and irredeemably, as exhibited on the face of the debtor's charter and sasine. See also 10th March 1629, *Shaw v. Kinross*.

8. "It does not make an exception to this rule, that the owner's personal wrong is of an older date, and taints even his way of acquiring the subject. Still, if this wrong in the case amount to a fraud only, and goes no deeper, it does not touch the right of an onerous and *bona fide* purchaser. As, for instance, if the author acquired in

infringement of the Bankrupt Act 1621, but the buyer knew not the relation or the bankruptcy. Again, suppose that William gives a mandate to his friend or his agent, Robert, to buy for him such a house, the property of John, which is in the market at the time. But Robert proves false on this occasion; buys the house from John for himself; pays the price, gets a disposition, and is infest. In these circumstances, any one is in safety to buy this house from Robert. True; there is a fraud here, as between Robert and William, but there is nothing deeper. John, the owner of the house, truly means and contracts to sell it to Robert, as for himself, and on his own credit. He knows nothing about William's mandate, and he disposes accordingly to Robert. As between John and Robert there is no wrong. The wrong is between Robert and William, and lies only in Robert's infringement of William's mandate, which is his personal and private fault. Or, again, put the case, that by fair promises and deceitful representations, James prevails with John to sell him certain lands, and to deliver him a disposition of them without getting payment of the price. James is infest on this conveyance, and sells to William, who buys *bona fide*, pays his price, and is infest. William has here an unchallengeable right to the lands. Though deceived with respect to the prospect of payment, and even the inducement to deal with James, still John does consent and contract, and in pursu-

ance makes delivery. Being thus, in due form, made owner for the time, James, in like manner, conveyed and delivered to William. The result is, that not being partaker of James' fraud, and not having been interpellated by any previous challenge of James' right, William is not affected by any reduction, *ex capite doli*, which may afterwards pass against James.

9. "And here the question arises, Does this rule go all lengths, so as to defend a purchaser against every imaginable ground of challenge of his author's right, and how deep and inherent soever? That consequence does by no means follow; nor did the Legislature ever intend, when they established the system of records, that a purchaser should be invested with any such absolute and impregnable security—a security which cannot be given him consistently with principles either of law or substantial justice. There are, on the contrary, a whole class of cases, in which no such privilege can, in either point of view, be sustained, viz., all these cases where the author's feudal investiture, regular though it be, *ex facie*, is, however, intrinsically vicious, as involving a falsehood in its texture, and assuming that for true which never happened. Put the case that John, who sells the lands, has forged, or has, *vi et metu*, extorted the disposition on which he is infeft; or that it is a settlement made *in lecto*, or a disposition from an infant or a lunatic, or a minor without consent of guardians, or a married woman without her husband's

consent. In all these instances, and several others might be mentioned, John could not possibly be owner of the lands, because either there has been no consent at all to convey to John, or none that the law considers, or makes any account of as a consent. Or again, suppose, that taking advantage of an elder brother's long absence abroad, John obtains a special service and retour as his father's heir of line, and thus is infeft in the family estate: or, what if he vitiates and alters in his own favour the clause of destination in an old settlement, and that, with this corrupted deed, obtain a special service as heir of provision, and is thereon infeft. The ground of challenge here is something deeper than a personal wrong, or the infringement of an obligation. It is a *labes realis*, intrinsic to the real and feudal right, and touches, therefore, all who acquire the subject, how onerously and fairly soever. In these and the like cases, the author has a corrupt and supposititious investiture only. John is not his father's eldest son, or heir of line, nor the heir of provision called by this settlement. John has never had the consent of the last owner to convey the lands to him, at least not the consent of such an owner as the law considers to be capable of consenting. This is a fundamental and an incurable disease of his investiture. It bears within itself the elements of its own dissolution. Consistently, therefore, with principles of law or justice, such an investiture cannot improve by being placed upon

record; nor did the Legislature intend to create for a purchaser any such absolute and impregnable certainty of right,—a certainty which is not attainable in the business of life, and would be a downright wrong to the former and true owner, who is nowise to blame. In the several cases formerly put, the challenge was of a different and a more superficial sort, not being bottomed in any falsehood. Though called by the personal deed of tailzie, James was still the entailor's eldest son and heir of line, and as such he rightly got his service. The verdict in his favour declared nothing but the truth. For his father died vested in the fee-simple of the lands; and out of the estate of *hæreditas jacens*, into which the fee fell on that event, it was competent and regular for his eldest son, though called by the tailzie, also to take it by a service as heir of line. The same was true in the case of his service as heir of line to a father, who had taken his investiture to him and his heirs-male, *contra fidem tabularum nuptialium*. In like manner, though James infringed his back-bond of trust or latent letter of reversion, or the mandate to buy for his friend, still true it was, that James had got an absolute investiture on record with the consent and by the act of the last owner of the subject. This consent may have been obtained by improper, nay, even fraudulent means; but still obtained it was. Though deceived as to the inducements to contract, the party did actually covenant and agree to convey, and

did convey accordingly. This truth was the ground of James' investiture, which is, therefore, in itself a sound and warrantable right.

10. "There is thus an obvious and a substantial difference between those two sets of cases, and it is not a good objection to the system of registration, that our practice recognises such a distinction; for the records are highly and extensively serviceable, without giving them so unlimited an application. *First*, They publish to the world every infestment that is taken, such as it is. Thus, all concerned know of its existence, and have an opportunity to scrutinize and inquire into all the circumstances of the conveyance, and the progress of titles. *Secondly*, The records furnish a clear and a convenient rule, viz., by priority of registration, for deciding the preference between double rights flowing from the same author. They are preferable in the order of registration, not, as formerly, in the order of time, or of natural possession. In the *third* place, they secure a purchaser against all latent contracts, back-bonds, or personal engagements of his author, granted in defeasance or abatement of his feudal interest. In a question with a purchaser, and so far as concerns any transaction of this sort entered into by a feudal owner, his estate is held and considered to be just what is exhibited on the face of the record, and nothing lower or different.

11. "It may be proper to state one case more in farther illustration of the difference between a personal ground of challenge, and a chal-

lence on the head of inherent nullity. The case comes near another one formerly put, and is so much more apt for our purpose. Suppose that John means to invest his friend James with certain lands in trust; but instead of relying on a separate letter or back-bond, he disposes to James expressly and openly in trust, and inserts in the precept and procuratory all the suitable and necessary clauses for limiting his right. But in drawing the instrument of sasine, the notary *per incuriam* omits, or he falsely throws out those provisions, and delivers sasine to James, as of the full and absolute fee of the lands. This is not a case of fraud or personal challenge only, but a case of inherent vice and nullity, or essential defect of right, which shall prevail alike against an onerous and *bona fide* purchaser from James, as against James himself. James, in such a case, never had John's consent to convey to him in fee-simple, or to make up, on the face of the parchment even, a pure and absolute investiture. John, in this instance, did not in any wise trust to James' good faith, or put himself in the discretion of James. On the contrary, he intrinsically limited and qualified his consent to convey; and when he established a certain sort of interest in favour of James, he, in the same instrument, prescribed the quality and fixed the limits of this interest, and made it, instead of an absolute interest, a fiduciary and defeasible interest only, as much so as that of one to whom a moveable *corpus* is delivered on

pledge, or a bargain of loan or deposit, and nothing better. It is thus in the one case equally as the other, *ultra vires* of the holder of such a right to alter or amplify his estate, by transferring his interest to another, although ignorant and in *bona fide*. The truth is, that James has here taken a sasine for which there is no warrant in John's conveyance, and which falls therefore to be utterly disregarded. Nor can the purchaser complain; for he ought not to have relied on the instrument of sasine, without calling for and inspecting the precept.

12. "In the close of all, it may be mentioned, that what shall be deemed a fundamental nullity, and what a breach of obligation only, or ground of personal claim, may sometimes depend as much on the shape of the transaction, as on any substantial difference in the *actum et tractatum* between the parties; and that though the rules and maxims of law on this head may be delivered in the same words, in the case of heritage and moveable *corpora*, yet still there is sometimes a material difference in the practical result. Put the case, that I deliver some moveable *corpus* to John, and say to him, 'I give you the use of this thing for a time;' or I say, 'You have to keep this thing for me, and return it to me on demand, and account for the intermediate profits, if any be.' This is a loan, or a trust and deposit only,—a lower and a limited title, which never can change or improve by transmission from John to another. Now, if I convey an estate of land to John

by an absolute deed, and, of the same date, take a separate back-bond from John, binding him to denude and account to me when called on, the *res gesta* is at bottom much the same here as in the other cases, yet the result is different. John has here the right of property of this estate, under a personal obligation only to redispone; and he may convey the property to another, who, if in *bona fide*, shall not be liable to account or reconvey in any manner of obligation to me. He has got a true and warrantable feudal investiture with my consent, and by my own deed. This makes him owner, and he may convey the pure and unqualified property to another. The reason of the difference lies in the forms of the two transactions—the one a verbal, the other a written form. The former is a single, entire, and simultaneous transaction, without separation or succession of parts. All that passes on the occasion goes to form one complex agreement of parties, whereof all the particulars cohere, are proved in the same course of evidence, and mutually qualify and support each other. Thus the delivery is instantly affected by the stipulation of loan or deposit, and becomes a delivery in loan or deposit only, and not in property, and such must remain for ever. In the other case the entire transaction—the *res vere gesta*—is divided into moieties, which are exhibited in distinct instruments; and so far from speaking the same language, these derogate from and oppose each other. The law in conse-

quence naturally divides the transaction itself into two parts, and ascribes different effects to these successive instruments; to the disposition and sasine the effect of vesting the pure and absolute property of the land, as expressed in these writings; to the back-bond the effect of creating a personal claim to reconveyance. And not only is this a natural view of the situation; it is also deeply founded in the structure of our system of law. For since the written investiture represents, and is received with us for, natural power and real dominion, so nothing can limit or essentially qualify the owner's estate and interest, unless it is inserted in the two instruments—the charter and sasine—whereof that investiture is composed. In fine, the situation is much the same here as it would be in the case of a moveable *corpus*, if I to-day were to make a gift of a moveable to John, to be his own, and if, a month after delivery, I should exact a promise from him to return the thing in a certain event, in which case, being separate from, and subsequent to, the acquisition of the pure and unqualified property, this promise would (I take it) be of a personal nature only, as much so as an engagement to sell the article to some third party. There is, in fine, a sufficient room, and fair ground for such a view of the situation of parties who transact in such a way about land; and this notion could hardly fail to be followed out in a system such as ours, which pays so high a regard to the interest of this sort

of commerce, and has devised so many records for the purchaser's protection. Comparatively speaking, these would be of little service to him if he had to look farther than to the face of the investiture itself for information respecting the condition of his right in matters of this description, such matters as are not to the impeachment of the author's own written right are false and vicious, but originate in his private engagements only respecting it."

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*Although Rights granted by the Heir of Investiture, and made real before the Disponee under a preferable personal title has established his right, will be good against the Estate, an Adjudication led by a Personal Creditor of the Heir during the dependence of an Action of Declarator at the Disponee's instance will be excluded.*

WAUCHOPE v. FERRIER.

THE lands of Crookedshaws formed part of the unentailed estate of John Duke of Roxburghe. The heirs of the investiture were the heirs of the entail in the estate of Roxburghe, but the lands of Crookedshaws were not subject to the fetters of the entail. John Duke of Roxburghe took up these lands by a service to his father. In 1803 he conveyed to trustees all his unentailed property; but in the special enumeration of various lands which the deed contained, the lands of Crookedshaws were omitted. On the death of Duke John they were taken up by Duke William by a service to his brother, and he continued in the undisturbed enjoyment of them during his life. Duke William having conveyed them to trustees for payment of his debts and other purposes, his trustees, on his death, were infeft on the precept contained in the disposition in their favour, and they also obtained undisturbed possession of the lands.

July 1, 1817.

NARRATIVE.

In February 1813, the trustees of Duke John raised an action against the trustees of Duke William, to have it declared that the former had the only good and undoubted right to the lands of Crookedshaws, and to have the latter ordained to denude themselves of them in favour of the former.

- WAUCHOPE**  
**v.**  
**FERRIER.**  
 1817.  
 June 21, 1814.
- In this action LORD ALLOWAY, Ordinary, “ Found, that after completing a real right to these lands, William Duke of Roxburghe conveyed them to the defenders, his trustees, for the purpose of paying his debts ; and they were infeft thereon : Finds, that William Duke of Roxburghe having a real right in these lands, if he has conveyed the same to onerous creditors, who have been infeft therein, and have *bona fide* advanced money on that security, they must be preferred to the pursuers, who merely claim a personal right to these lands in virtue of the trust-deed executed by John Duke of Roxburghe : But finds, that it is necessary for the defenders to condescend upon the debts which were contracted upon the faith of their infestment, and appoints the defenders to lodge a condescendence thereof ; and decerns.”
- Jan. 29, 1815.
- On a representation to the Lord Ordinary by the defenders, his Lordship refused it, in so far as relating to the trust-deed executed by John Duke of Roxburghe in 1803, &c. ; “ But in so far as an explanation is craved of the last part of the interlocutor, in respect that Duke William completed his title to the lands of Crookedshaws as the heir of investiture, and was infeft therein, and conveyed these subjects to the representers, as his trustees, for the payment of his debts, who were also infeft therein, and who were allowed to remain many years in possession, without any challenge whatever of their right ; and during which period, it is alleged, they *optima fide* paid the debts of the Duke, and contracted other debts upon the faith of their infestment ; and certain creditors under the trust, it is alleged, have adjudged these subjects, Finds, that the representers must be preferable, in virtue of their infestment, to the amount of the debts *bona fide* paid by them, or contracted by them *bona fide* upon the faith of their infestment, and that the creditors under the infestment of Duke William’s trustees must be preferable to the personal claim of the pursuer ; and with this explanation adheres to the interlocutor complained of, and renews the order for a condescendence of all the debts paid by the trustees, or to which the representers have *bona fide* subjected themselves in terms of the trust.”
- May 12, 1815.
- On a representation by the pursuers, the Lord Ordinary “ Adhered ” to the interlocutor complained of.



Both parties having reclaimed, the Court “Altered the Lord Ordinary’s interlocutor, and Found that William Duke of Roxburghe made up a feudal title to the lands of Crookedshaws, as heir of entail to Duke John, and thereafter conveyed the same to the defenders, his trustees, who were infeft: Find, that if William Duke of Roxburghe or his trustees, while thus infeft in the lands, had disposed the same to onerous purchasers, or had granted heritable securities over the same, that such sales and securities would have been good in a question with the petitioners claiming under a personal deed of Duke John, who held the estate under the same line of titles and infeftments as Duke William; but find that the defenders have not condescended on any heritable rights so granted either by Duke William or by themselves in the discharge of their trust: Find, that the defenders would have had a right of retention over the said lands against Duke William, and his heirs and creditors acceding to, or taking benefit under the trust for all sums *bona fide* advanced or borrowed by them for the purposes of the trust; but find, that they have no such right of retention against the pursuers, the trustees of Duke John, who claimed under a title preferable to that of Duke William: Find, that the infeftment taken by the pursuers in June 1814 is inept, the precept only containing warrant for infefting in the lands ‘lying and described as aforesaid,’ and the lands of Crookedshaws are not previously described; and upon the whole Find, that the pursuers are entitled to the said lands, free and unencumbered of any personal debts or advances of Duke William or the defenders, and that the pursuers are entitled to enter into possession as at the term of Martinmas 1815, and to levy all the rents and profits becoming due subsequent thereto; and decern and declare to that effect, and also in terms of the other conclusions of the libel.”

WAUGHOP  
v.  
FERRIER.  
1817.

Feb. 18, 1816.

In 1804 Duke William had granted a bond to Mr. Gawler for £2000. Various payments were made to Mr. Gawler towards liquidating the debt during the Duke’s lifetime, and certain payments were also made from his Grace’s personal estate after his death. In 1807 Mr. Gawler assigned the bond to John Leach, Esq. of Lincoln’s-Inn, who soon after com-

WAUCHOPF  
v.  
FERRIER.  
1817.

menced an action for payment of the balance of the debt against the then Duke of Roxburghe and the other persons then claiming the Roxburghe estates. Before any important procedure had taken place in the action, Mr. Leach assigned the bond and depending process to Mr. Ferrier.

In this action the Court found that the bond, having been granted prior to the recording of the Roxburghe entail, the estate was liable for payment, and decerned against the Duke. A reference was afterwards allowed to the oath of Mr. Gawler, the original creditor, from which it was found, that although the bond was granted before the recording of the entail, the money was not actually paid to the Duke for some days after. Upon this the Court altered their former interlocutor, and assoilzied the defenders in the action.

Mr. Ferrier, the assignee to the bond, then, in March 1814, brought an action for payment against Duke William's trustees, and having obtained decret of constitution against them, he proceeded to adjudge the lands of Crookedshaws. In the process of adjudication Duke John's trustees appeared and maintained that the attempt to adjudge these lands was inadmissible, inasmuch as the question was then in dependence whether these lands were the property of Duke William, the adjudger's debtor, or of Duke John's trustees, against whom the adjudger had no claim. The adjudication was then passed under reservation of all objections, *contra executionem*, and a charter of adjudication was then expedite, on which Mr. Ferrier was infeft.

Duke John's trustees then brought a reduction of Mr. Ferrier's adjudication, on the ground that the lands adjudged were not the property of Duke William's trustees, the alleged debtors of the adjudgers. In this action all proceedings were suspended until the decision of the question of right. In the question of right, Duke John's trustees having been successful, their action for reducing Mr. Ferrier's adjudication was then proceeded with.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—The question is, Whether not during the dependence of an action for ascertaining a disputed right to heritable property, a personal creditor of one

the parties can carry off the lands in dispute, and vest himself with a right which is ultimately found not to have belonged to his debtor?

WAUCHOPE  
v.  
FERRIER.  
1817.

The defender did not contract either with Duke William or his trustees on the faith of the records. He acquired no right whatever to these lands from those parties, in the *bona fide* belief of its efficacy. On the contrary, he remained merely a personal creditor whilst the right of these trustees was unchallenged, and only commenced a process of adjudication after the right of their debtor to the lands was contested and rendered litigious at the instance of the party ultimately found to be the true proprietors. Whatever may be the law in the general case, an adjudication obtained under these circumstances is unquestionably limited in its effect to the attachment of the subject, *tantum et tale*, as it stood in the debtor. To extend it to the effect of vesting in the adjudger a right ultimately found in the depending action not to have been in the debtor, is utterly at variance with every principle of justice. It is not denied that in every question with third parties the right of a person infeft and in possession of lands, or any other species of heritable property, is held to be determined exclusively by his title appearing in the records. If that title be *ex facie* good, the purchaser completing his right by infeftment is held to be secure against any personal claim which might have been good against the seller. But that rule, introduced for the security of those relying on the faith of the records, cannot extend beyond the limits of the principles which warranted its introduction. Accordingly, when any purchaser or third party is aware of the defect of the right of him with whom he deals, he is deprived of the benefit of that rule for the sufficiently obvious reason, that he cannot be held to have rested on the unqualified right as appearing by the records, but knowing its defects, must be held to have taken the chance of the right as he knew it to stand in the person of the other party. Against him the Claimant on the preferable right, although personal, is entitled to plead every objection which would have been good against such third party's author, and to carry off the lands free and unencumbered, if he can establish his preferable right.

It is an abuse of terms to confound the claim of a party who

WAUCHOPE  
v.  
FERRIER.  
1817.

holds a preferable, though personal, right to land, with the right enjoyed by the creditors of the person who holds merely an *ex facie* title to these lands. If Duke William's trustees had sold the lands, or granted heritable bonds, such sales and heritable bonds, if completed by infestment, would have been effectual. But if before any such burdens are fixed upon the lands, the disponent holding the preferable right commences an action, declaring his right against the heir who has made up a title, it is impossible to hold that such a claimant is a mere personal creditor. He has no doubt only a personal action, and so far he may be said to be a personal creditor, but then he is creditor for the actual property of the subject in dispute. He is not as a creditor in an ordinary adjudication, demanding the conveyance of the subject in payment of his debt, a conveyance which only takes effect by decret, but he is demanding that the subject shall be declared his own, and as having been his own from before the date of the action. The only effect which the defender's adjudication could have, was to vest a right, *tantum et tale*, as it stood in the person of his debtor. If there was no right in his debtor, he could take nothing by his adjudication, and in the action of declarator raised by the pursuer, the question really at issue was, Whether or not there was any right in the debtor? A decision in the negative must have a retrospective effect from the raising of the action.

The pursuer did not, as an adjudging creditor, take any right from the party against whom he brought his action. He claimed in virtue of his own prior right, which must be held to have existed at the date of the summons, and all that he obtained by the decret was the title or possession from which he had been unduly excluded. Had the defender obtained his adjudication before the raising of the pursuer's action, and completed his right by infestment, such infestment might have been available against the pursuer, but having neglected to adjudge till after the raising of the action, he can only take that which the result of the action has shewn to be in his debtor. There is no point better ascertained in the law than the distinction between personal and heritable rights. In the case of completed real rights, the title *ex facie* valid of the granter of them secures them from all challenge. On the con-

trary, a mere personal creditor attempting to attach the lands will be effectually met by every defect or qualification, however latent of the right or title of the party with whom he dealt exclusively on the footing of personal credit. Where such personal creditor attempts to make his right real by adjudication, the appearance of the true proprietor proving his right of property by a back-bond, or any other evidence, would be sufficient to bar such adjudication.

WAUCHOPE  
v.  
FERRIER.  
1817.

It is admitted that the litigiousity arising from adjudications, or from diligences by creditors, only bars voluntary grants by the debtor, and has not the effect of invalidating diligence or adjudications attempted by another creditor. But the litigiousity here is not that arising from diligence by creditors. It arises from an action in which the point at issue was the debtor's right to the lands. The pursuer in such an action, though holding in one sense only a personal claim, is not a mere personal creditor, any more than a person who has given over an estate in trust is the mere personal creditor of the trustee. He is in fact the proprietor of the subject making good his right ; if creditor at all he is creditor *dominii*, and the consequence of his success in the action is the establishment of his right from the commencement, though the title and possession were vested in another for his behoof.

PLEADED FOR THE DEFENDER.—The debt now in the person of the defender was a debt *bona fide* contracted by Duke William himself in 1804, while his right to the lands of Crookedshaws was undisputed, and even acknowledged by the pursuer himself. The adjudication upon the debt was led against the lands, which stood effectually vested by titles undeniably valid in Duke William at the date of the bond, and in his trustees at the date of the adjudication. In their persons the lands were attached by the proper diligence of the law for securing and making effectual a fair and onerous debt contracted by Duke William for money advanced in 1804. Is this diligence of the law on a debt contracted in 1804 barred by the action of declarator against the trustees of Duke William in 1813 ? Is the using of diligence by the pursuer who was no party to that action barred by the litigiousity ? These are the questions

ARGUMENT FOR  
DEFENDER.

WAUCHOPH  
v.  
FERRIER.  
1817.

raised in the present action. The title of property was in Duke William, with whom the defender contracted. It was also in the trustees against whom he led the adjudication. There was no reduction of that title, but merely a personal claim by the pursuer against these trustees. The doctrine of litigiosity, *pendente lite nihil innovandum*, applies only to voluntary rights granted by the defender in the action, and does not affect steps of legal diligence by his creditors on debts previously contracted. A creditor is not barred from using diligence on a debt long before contracted, merely because he knew that another person was making a personal claim against his debtor. The cases relied on by the pursuer were all cases of voluntary rights, or securities obtained from the debtor after the party was aware that the title was disputed. In the present case the title was not disputed, but at any rate there was no voluntary right. The pursuer's debt was contracted nine years before any action was brought, and though it was only a personal debt, the pursuer, who relied on all the property in his debtor's person, was entitled to secure himself by diligence at any time, and was no more *in mala fide* to use such diligence than a creditor by a bill is barred from arresting, because another creditor has instituted an action.

The pursuer, in virtue of a personal conveyance by Duke John, made a claim against the trustees of Duke William to convey the lands to him. He pretended no real right in the lands; he acknowledged the title of Duke William and the trustees. But he substantially stated that Duke William, as the heir of the investiture taking up the lands, was personally bound by the deed of Duke John as representing him. If Duke William had sold the estate, and the purchaser had obtained infeftment, he would have been safe. If he had granted an heritable bond, and the creditor had obtained infeftment, he also would have been safe. If the creditor had not taken infeftment on his bond until after the pursuer's action was raised, he would have had no more lien upon the lands, and would have been no more a real creditor than the pursuer's author was by his personal bond. But it will scarcely be maintained that that creditor would have been barred from taking infeftment on his bond merely because the pursuer had brought an action claim-

ing the land. According to the pursuer's argument, however, he would have been *in mala fide* to take any step for creating a real security because *pendente lite nihil innovandum*. The reason why a creditor may take that step is that *utitur jure suo*. It is no act of the defender in the process, it is no innovation to which the maxim of law applies : and yet it as effectually creates a real right, where no real right previously existed, as an adjudication can do.

WAUCHOPE  
v.  
FERRIER.  
1817.

Every man who lends money, or gives credit to another, does so on the faith of all the property of which he is in possession. If he has confidence in the good faith of his debtor, and in his general credit, he has no occasion to ask a special security. Every man's credit depends on a comparison of his funds and his debts, and it is extravagant to state that when a man gives credit to a person in possession of an heritable estate on absolute titles, he does not contract on the faith of the records. Such a statement is contrary to the law, as held in the case Smollett and other cases, and to the most obvious views of common sense.

In supporting the charters and infeftments of adjudication now sought to be reduced, the authority and security of the records in favour of creditors *bona fide* contracting with the proprietor in the fee, holding public and undisturbed possession of the property, will be sustained. If, in doing so, the pursuers suffer any loss, the fault is their own in not having made their claim in due time ; but, on the contrary, in having acknowledged and homologated the possession of Duke William and his trustees.

The Court pronounced the following interlocutor :—" In re- JUDGMENT.  
spect the several adjudications libelled of the lands of Crooked- Feb. 28, 1817.  
shaws were obtained during the dependence of the process of declarator at the instance of the pursuers, for effectuating their preferable claims over the said lands, in which process the pursuers have prevailed : Find, that the said adjudications are invalidated by the litigiousness created in the said process ; and therefore reduce, decern, and declare in terms of the libel."

LORD HERMAND observed,—“ The title of Duke William is OPINIONS.  
feudally good—admitted to be so. True there was a personal MS. Notes,  
Baron Hume's  
Session Papers

WAUCHOPE  
v.  
FERRIER.  
1817.

claim in Duke John, but was quite latent. It was not a case of competing real right—was merely personal. Won't affect onerous creditors contracting on the faith of the infeftments.

"In short, question is, Does the adjudger take *tantum et tale*? Clear; he won't prevail against any feudal quality; but against bonds and frauds he will prevail. Case of *Anderson v. Dempster*. Law well stated in defender's Information. Case of Thomson threw some doubt on the law. But it is explained in Dict. vol. 4, and Mr. Bell's Commentaries, that the report is erroneous."

LORD BALGRAY.—"Had estate been sold, or heritable bond granted, that would have been good. But these creditors were personal, and remained so till the summons of declarator was raised. That made it litigious. An heritable bond thereafter granted and no sooner, would have been bad. In case of Thomson, words *tantum et tale* carried too far, loosely and broadly used. The fact was, that the adjudgers were not infeft. If infeft, would not have been affected. That was the ground of judgment. The litigiosity settles this case, without going into the other question."

LORD PRESIDENT.—"I am sorry for it, but this case must go against the defender on the ground of litigiosity. It cannot be got the better of. If not applied here, it would come to this, that a person dispossessed, though having the best title, never could recover. The possessor infeft would sell or cover the whole with heritable bonds as soon as the right owner's process raise it, and thus utterly disappoint him."

July 1, 1817.

The defenders having reclaimed, the Court "Adhered."



*An obligation ad factum prestandum, if made the condition of a feudal grant, and if it enter the Investiture of the Disponee, may be enforced against a Singular Successor, although neither declared a real burden nor protected by an irritancy.*

## TAILORS OF ABERDEEN v. COUTTS.

IN 1823 the Corporation of Tailors of Aberdeen sold to George Nicol a stance of ground, on which it was intended that a square should be built. The articles of roup provided that the Corporation should erect a metal railing round the centre of the square, and that the feuars in the square should maintain the railing in complete repair. The articles also provided that the feuars should be obliged to pay, along with their first year's feu-duty, a proportion, according to their extent of feet in front, of two-third parts of the expense of erecting the railing along the centre of the square. The feu-duties were declared to be payable by the purchasers, their heirs and successors. The purchasers were also declared obliged, at their own expense, within three years after their respective entries, to form and lay with well hewn hill-stone, the foot pavement opposite to and along their respective properties. The purchasers, and all succeeding heirs and singular successors to them, were also declared to be obliged, within six months after their acquiring right to the premises, to grant, at their own expense, personal obligations for payment of the feu-duties or annuities at which the lots were taken, as well as for performance of the whole conditions prestable by them, in terms of the articles of roup, and that without prejudice to the real right competent to the Corporation, by virtue of the *reddendo* and precepts of sasine to be contained in the charters and dispositions and of the infestments to follow thereon. The articles farther declared that the annuities or feu-duties should be real burdens, affecting the respective lots or stances, and the houses to be built thereon, and the charters to purchasers were to be granted with and under the several conditions, provisions, and declarations specified in the articles, all of which were to be

Aug. 3, 1840.

NARRATIVE.

TAILORS OF  
ABERDEEN  
v.  
COUTTS.  
1840.

engrossed in the charters and the infeftments following thereon, and in all future rights and conveyances of the subjects.

The subjects conveyed being held burgage, the disposition granted to Nicol contained a procuratory for resigning, in order to obtain an entry from the Magistrates. In this disposition the various conditions were specified, and upon the disposition infeftment followed, in which also these conditions were expressed.

After Nicol had built houses on his lot of ground he became bankrupt, and Adam Coutts purchased the ground and houses, and obtained a disposition and infeftment, which omitted the greater part of the conditions and obligations contained in the articles of roup and in the conveyance to Nicol. The Corporation thereafter raised an action against Coutts, concluding that he should be ordained, *first*, to grant them a personal obligation for payment of the ground-rent, and for performance of the whole clauses and conditions contained in the articles of roup, and the disposition to Nicol, in so far at least as these were not already implemented; *second*, to pay them £16, 6s. 6d. as the proportion effeiring to the subjects acquired by him of the expense of erecting the metal railing in the square; *third*, to lay the pavement, conform to articles of roup and the disposition; *fourth*, to erect an iron railing (at one side of the pavement), in terms of the articles and disposition; and, *fifth*, to pay £27, 14s. 2d. as his proportion of a common sewer.

Coutts resisted payment, or performance, of these demands, on the ground that they did not effectually attach to him, a singular successor, as they were neither made real burdens, nor protected by a condition of irritancy.

ARGUMENT FOR  
PURSUERS.

PLEADED FOR THE PURSUERS.—The obligations sought to be enforced were made conditions of the right conveyed, and Nicol could not transmit the right to any party unaffected by these conditions. Besides, the stipulation to pay a proportion of the railing round the square was the counterpart of the privilege conferred of walking in the square; and as Coutts had acquired the privilege, he must be liable in the counter prestation; and so also as to the other obligations. As Coutts saw every obligation which was imposed on Nicol, by inspecting his

titles, he was in *mala fide* to accept a disposition from Nicol, except under the liability to give full effect to all these conditions. The conditions, being engrossed in the instrument of infestment of Nicol, were good against a singular successor, whether protected by an irritancy or not, and whether declared a real burden or not.

TALLOES OF  
ABERDEEN  
v.  
COUTTS.  
1840.

PLEADED FOR THE DEFENDER.—The obligations sought to be enforced were not made conditions entering the constitution of the feudal right, but merely personal obligations on Nicol. He was liable to fulfil them ; but if he failed, no irritancy was annexed to his failure, and the only consequence was, that he was liable in damages. No singular successor could be liable, except either for real burdens, or for such personal obligations as were laid upon himself in the immediate title granted to him ; or, by the insertion of an irritancy in his author's right, in the event of any of the personal obligations laid upon that author remaining unimplemented. But the conditions and obligations sued on did not belong to any of these classes. And as some of the conditions in the grant to Nicol were expressly declared real burdens, and others protected by irritancies, it was evident, even in a question of intention, that the rest were meant to attach to Nicol only, and not to a singular successor from him. Many of the conditions did not admit of being declared real burdens, even by being engrossed in the infestment ; such as the indefinite liability for a proportion of the expense of the railing in the square. And, generally, the conditions and obligations in the infestment were so conceived as to attach only to Nicol, and not to a singular successor in the subject.

ARGUMENT FOR  
DEFENDER.

LORD COREHOUSE, Ordinary, “ Found, that the defender is not bound to grant to the pursuers for behoof of the Corporation, a personal obligation for payment of the yearly duties or ground-rents specified in the libel, or for performance of the clauses and conditions contained in the articles of roup, or in the burgage disposition granted by John Finlayson, boxmaster of the Corporation, in favour of George Nicol : Finds, that the defender is not liable to pay to the pursuers, or their successors

Nov. 19, 1833.

TAMMERS &  
ASHERMAN  
v.  
COWEN.  
1840.

in office, the sum of £15. 6s. 6½d., with interest, as part of the expense of erecting the metal railing and dwarf wall round the centre of Bon Accord Square: Finds, that the defender is bound to lay the foot pavement opposite to, and along the sides of the subjects disposed to George Nicol, and to erect an iron railing at the east end of the said subjects, in conformity with the provisions in the burgage disposition, and within the time therein mentioned: Finds, that the defender is not bound to lay the pavement at the west end of the subjects fronting Bon Accord Terrace, there being no obligation to that effect in the disposition to Nicol: Finds, that the defender is liable to the pursuers in the sum of £27, 14s. 2d., being his proportion of the expense of erecting a common sewer, of which he has taken benefit since his purchase from Nicol; assoilzies the defender from all the other conclusions of the libel, and decerns."

JUDGMENT.  
Dec. 18, 1834.

Both parties having reclaimed, the Court "Adhered."

Both parties having appealed to the House of Lords, "It was Ordered that the cause be remitted back to the First Division of the Court of Session in Scotland, to consider and state to this House their opinion upon the following questions:—

"*First*, Are any of the obligations in the feu-charter, and which of them, of such a nature that they are binding upon singular successors, without either being declared real burdens or being fenced by irritancies?

"*Second*, If any one of the obligations is such that it may be a real burden without being so declared, is an irritancy necessary to make it binding upon singular successors?

"*Third*, Are any of the obligations, and which of them, of such a nature that an irritancy would not make them binding upon singular successors as real burdens, without words declaring them real burdens?

"*Fourth*, Is there any difference, and what, between the effect of an irritancy which forfeits the right of the singular successor only, and one which sends the feu back to the superior, in making the obligation to which it is annexed binding upon singular successors?

"And the said First Division of the Court is hereby required

to take the opinion of the Judges of the other Division of the Court and of the permanent Lords Ordinary upon these questions, and for this purpose to direct the printed papers in the cause, including the printed cases laid before this House, to be laid before the Judges of the other Division and the permanent Lords Ordinary, for their opinions in writing thereupon; and this House does not think fit to pronounce any judgment upon the said appeals, until after the whole Judges of the Court of Session, including the Lords Ordinary, shall have given their opinion upon the questions hereby referred to their consideration, according to the directions of this order."

TAILORS OF  
ABERDEEN  
v.  
CORTIS.  
1840.

In the Opinion returned by LORDS GILLIES, MACKENZIE, COREHOUSE, and JEFFREY, their Lordships observed,—“To constitute a real burden or condition, either in feudal or burgage rights, which is effectual against singular successors, words must be used in the conveyance which clearly express or plainly imply that the subject itself is to be affected, and not the grantee and his heirs alone, and those words must be inserted in the sasine which follows on the conveyance, and of consequence appear upon the record. In the next place, the burden or condition must not be contrary to law, or inconsistent with the nature of this species of property; it must not be useless or vexatious; it must not be contrary to public policy, for example, by tending to impede the commerce of land, or create a monopoly. The superior, or the party in whose favour it is conceived, must have an interest to enforce it. Lastly, if it consists in the payment of a sum of money, the amount of the sum must be distinctly specified.

“If these requisites concur, it is not essential that any *voces signatae* or technical form of words should be employed. There is no need of a declaration that the obligation is real, that it is *debitum fundi*, that it shall be inserted in all the future infeftments, or that it shall attach to singular successors. It is sufficient if the intention of the parties be clear, reference being had to the nature of the grant, which is often of great importance in ascertaining its import. Neither is it necessary that the obligation should be fenced with an irritant clause, and far less with irritant and resolute clauses; which last are peculiar

THESE ARE  
A RECAPITULATION  
OF THE  
LAW.

is a strict entail—a settlement depending, as will afterwards be explained, upon a different principle altogether.

What has now been stated rests on the authority of Stair, book ii. 3, 54. and 55, book iv. 35, 24. and on that of Bankton, book ii. 5, 25, confirmed by a numerous train of decisions.

Thus, with regard to the form of expression, we may refer to the case of *Martin v. Paterson*, where the Court held, ‘that without requiring any technical form of expression for the constitution of a real lien, it is necessary that the intention to impose a burden on land by reservation should be expressed in the most explicit, precise, and perspicuous manner.’ At the same time, as just observed, the construction of the words employed will be affected by the nature of the grant. If the condition is one usually attaching to the lands in a feudal or burgage holding,—in particular, if it has a *tractus futuri temporis*, or is of a continuous nature, which cannot be performed and so extinguished by one act of the disponent or his heir, words less clear and specific will suffice to create it than when the burden appears to be of a personal nature; for example, the payment of a sum of money once for all in terms of a family settlement.

“To illustrate this distinction, some of the more ordinary feudal prestations in a charter, even though not clearly expressed, are held to be implied in a question with singular successors; and so far is this carried that there is a series of cases in which the Court found that certain urban servitudes with regard to the height and form of buildings, and restrictions as to the ground to be left vacant, were implied conditions of the grant, merely in consequence of the exhibition of the building plan by the superior to his feuars when the feu-contracts were entered into: *Shultze v. Campbell*, 26th November 1813; *Young & Co. v. Dewar*, 17th November 1814; and many others. It is true that those cases were disregarded by the House of Lords in *Gordon v. the New Club*, 11th March 1815; but they were so on the principle, that implied restrictions of that nature will not affect singular successors unless they appear on the record. If they enter the investiture, it was admitted on all hands that they would be effectual as conditions of the grant against all, whether purchasers or creditors, into whose

hands the subject might come : accordingly it has been so decided in many subsequent cases. Thus, in a suspension and interdict against a singular successor, *Brown v. Burns*, 14th May 1823, where there was a condition in the feu right 'restraining the feuar from dealing in trade and merchandise, goods or viviers, and from baking or brewing for sale, and the occupation of any handicraft,' it was held, 'that a superior may introduce conditions which are legal, and cannot be dispensed with but by his consent.' So in *Pollock v. Turnbull*, 16th January 1827, the Court found that a singular successor in an urban tenement might raise his house by adding a fourth story, because he was a singular successor, and the restriction was not inserted in his charter. When the restriction does appear in the investiture, the Court has uniformly enforced it against singular successors, and that not only in a question with the superior who had granted the right, but with third parties who had obtained a *jus quæsitum* under it ; for example, persons in the same street who had entered into feu-contracts on the faith that the restrictions laid upon the other feuars in the street were effectual. It was so decided with regard to a servitude *altius non tollendi*, *Cockburn and others v. Wallace, &c.*, 1st July 1825.

" The same rule holds with regard to all the prædial servitudes, as pasturage, fueling, aqueduct, thirlage, &c. Indeed, those conditions being so frequent and so intimately connected with the nature of a feudal grant, they may be constituted by a writing not entering the investiture, but followed by clear and unequivocal possession. Other conditions of a less frequent nature, and which do not fall under the description of servitudes, are equally effectual if they appear on the face of the investiture and in the record. Thus an obligation on the vassal in a feu-charter, 'upon his own proper charges and expenses to keep and uphold a boat of six oars, and to provide the same with six rowers and a steersman, and all things necessary for the usage of the superior and his family, in terms of the former feu-charters thereof, and also to keep the mansion-house now built upon the estate wind and water tight,' was enforced in a question with the creditors of the vassal. That was not a servitude known in the law of Scotland ; indeed, it was not a

TAILORS OF  
ABERDEEN  
v.  
COUTTS.  
1840.

TAILORS OF  
ABERDEEN  
v.  
COUTTS.  
1840.

servitude at all, because it consisted *in faciendo*, not *in patiando*, which, with some exceptions, is the criterion of that species of right.

“ Similar obligations occur in feu-charters, such as the carriage of fuel or of millstones, furnishing poultry, &c., all which being in the investiture, attach to singular successors ; and a great many others were usual in charters before the 1st of Geo. 1, sec. 2, cap. 54, which declared personal services illegal, for the preservation of the peace of the country, and with a view to diminish the influence of the Highland chieftains. But all such obligations not struck at by that Statute or by the common law, and being consistent with the interest of the community, qualify feudal grants, into whose hand soever the subject comes, either in a question with the superior or the parties for whose benefit the obligation is imposed, or those who have a *jus quæsitum* under it.

“ But there is another class of cases, as already mentioned, where the words must be much more precise and specific to make the obligation binding on singular successors. Thus, where the disponent is burdened with the payment of a sum of money, whether it be reserved to the superior himself or made payable to a third party, if the amount of the sum is not exactly specified in the investiture, it is unavailing, for the law of Scotland does not admit any indefinite burden attaching to lands. In support of that familiar and long established rule it is unnecessary to refer to authorities. Thus also, if the obligation is to be performed, and so extinguished, by a single act, the presumption is that the granter of the feu-right meant to impose it on the grantee and his heirs exclusively, and not to extend it against singular successors ; the case being the reverse of those where the obligation has a continuance, and is, comparatively, of little use unless it remains attached to the subject.

“ Prior to the decision in the House of Lords, *Lord Lovat v. Lady Lovat, &c.*, 1st April 1721, which appears to be the leading case on the subject, the Courts in Scotland treated an obligation to pay a sum of money much in the same way as other conditions in a feudal grant, without reference to the distinction alluded to. Since that time, and after some contradic-



tory judgments, it has now been settled that the most specific and precise words are necessary to extend a burden of this nature against singular successors. *Voces signatæ* need not be employed, but the intention must be as clearly expressed as if it were a condition of a strict entail. In evidence of this we may refer to the case *Martin v. Paterson*, already cited, in which, although the lands were disposed 'under burden of a sum' distinctly specified, and the sasine was taken 'with and under the burdens before mentioned,' it was found that this was a personal and not a real burden. A similar decision had been pronounced in *Stewart v. Home*, 18th May 1792, and it was repeated in *M'Intyre v. Masterton*, 3d February 1824. Much more precision, therefore, is requisite in cases of this nature than when the condition is plainly meant to attach to the subject as servitudes or prestations which may from time to time fall due.

" At one period it was made a question, whether obligations in feudal grants could be made effectual against singular successors without the protection of an irritant clause ; but it is now settled law that no irritant clause is necessary. Lord Stair, as Mr. Bell remarks, entertained no doubt of the efficacy of a clause of pre-emption, or the more sweeping clause *de non alienando sine consensu superioris* by force of the provision merely. On strict feudal principles they are effectual as conditions of the grant, without a compliance with which the superior is not bound to give an entry to the heir of the vassal. Lord Bankton is equally clear, and almost all the cases which have been referred to are instances in which conditions have been enforced without the aid of irritancies. Mr. Erskine's doctrine to the contrary rests entirely on the case of *Stirling v. Johnston*, 29th December 1756, to which he refers, but it is believed there is not a case reported in the books so objectionable in every particular. It was a clause of pre-emption in favour of the superior occurring in the charter but not in the infeftment of the vassal. Lord Kames, the Ordinary, annulled the right of a purchaser in contravention of this clause on the ground of *mala fides* on his part, because it was admitted that he knew of the condition, but, as Kilkerran remarks, ' the answer to this was, that as he knew of the condition, so he also

TAILORS OF  
ABERDEEN  
c.  
COUTTS.  
1840.

TAILORS OF  
ABERDEEN  
v.  
COUTTS.  
1840.

knew that it was ineffectual in law.' The Court altered the Ordinary's interlocutor, and supported the right of the purchaser, not on the clear and unanswerable ground that the condition was not in the investiture, which was the only legal certification to the purchaser, for they held, that being in the charter it was *in eodem corpore juris* with the infestment, forgetting entirely that the charter does not enter the record, while the infestment does. The ground they took was, that the condition was not fenced with an irritant clause, a ground for which not a single authority or decision in the law of Scotland can be quoted ; and they confounded the case with that of an absolute prohibition to alienate in a strict entail, to enforce which not only an irritant but a resolute clause is necessary under the Statute 1685. Mr. Erskine, misled by this single decision, cannot be considered as an authority upon the point ; and this is the opinion of Mr. Ivory in his note on the passage, and of Mr. Bell in his commentaries. They are fully confirmed by what fell from the Court in *Sir Robert Preston v. Lord Dundonald's Creditors*, and what was then stated to have been the opinions of the Lord Justice-Clerks Miller and M'Queen.

" It may be proper here to advert to the distinction between an irritancy fencing the condition of a feudal grant, and the irritant and resolute clauses necessary to enforce the prohibitions of a strict entail. This is well explained by Lord Stair : — ' It is much debated among the feudalists about clauses *de non alienando*, with an irritancy or resolute clause, or that the fiars should contract no debt by which the fee might be alienated or the tailzie changed, and they are generally for the negative, that clauses prohibiting contracting of debt, or simply not to alienate, are inconsistent with property, albeit they may be effectual if so qualified that no alienation be made or debt contracted to affect the fee or alter the succession, without the consent of the superior or such other persons ; but that being absolute, they cannot be effectual against singular successors ; whereas those limited prohibitions resolve but in interdictions, and being contained in the sasines registrate they are equivalent to interdictions published and registrate.'

" The principle is this : both by the civil and feudal law the power of disposal is considered as of the very essence of the

right of dominion, and no person being proprietor can be prohibited absolutely from alienating his property or contracting debt to affect it. To reconcile this doctrine with the anxiety of proprietors in Scotland to perpetuate their estates in their families, irritant and resolute clauses were invented or adopted about the commencement of the seventeenth century, and were considered at the time a very astute and subtle device to attain the object in view. The ground on which they proceed is, that the act of alienation infers a forfeiture of the proprietor's right, and the forfeiture is feigned to operate *retro*, so that he ceased to be proprietor before the act was consummated, and therefore it was null, as flowing *a non habente potestatem*. Perhaps there was never a more clumsy fiction introduced into law, one which has produced more anomalous and inconsistent decisions, or given rise to such interminable litigation. But, as Lord Stair observes in the passage quoted, those irritant and resolute clauses apply only to the case of an absolute prohibition to alienate. Where the prohibition is qualified, it may be enforced as a legitimate condition of the feudal grant by the ordinary legal remedies. Thus the clause *de non alienando sine consensu superioris*, which was very frequent in his time, took effect without an irritancy, as already observed; and so the law was held to be settled till the 1st of Geo. II., by which that prohibition was rendered illegal. This subject is more fully treated by Mr. Bell, and by Mr. Brodie in his note on the passage of Stair above quoted.

"It may therefore be considered as undoubted law, that if a condition in a feudal grant is conceived in terms to make it real, and is not objectionable on any other ground, no irritant clause is necessary to give it effect against singular successors. If it is clearly personal, or exposed to objections, an irritant clause will not support it.

"We now proceed to answer the questions in their order.

"I. We are required to say, 'Are any of the obligations of the feu-charter, and which of them, of such a nature that they are binding upon singular successors, without being declared real burdens, or being fenced with irritancies?' It has been mentioned that there is no feu-charter here. The obligations are contained in a burgage disposition. It is proper farther to

TAILORS OF  
ABERDEEN  
v.  
COUTTS.  
1840.

*Section 10*  
*Annotations*  
*2.*  
*Comment*  
*2401.*

observe that the question is not whether these obligations, in the circumstances of this case, and under the present summons and record, can be enforced against the respondent, but whether they are of such a nature that they are binding upon singular successors, without being declared real burdens or fenced with irritancies. Considering them, therefore, abstractedly as conditions inserted in a feudal grant, we shall examine them in that order.

" 1. It is a condition of the grant that the disponee and his heirs and assignees shall, within a certain time, erect house upon the subject of a certain description, and the condition is fenced with a penalty and an irritant clause. There is no doubt that this obligation is of such a nature as to be binding upon singular successors, although it is not declared in express terms to be a real burden, and although it had not been fenced with an irritancy. It is a condition extremely common in feu-rights, granted for the purpose of building; its validity was never doubted, and it is daily enforced. We may observe, in passing, that the irritancy with which it is fenced to a certain extent is not valid, and would be ineffectual both against the first vassal and his singular successors; for it is stipulated that the granter shall have power to use and dispose of the subject in the event of failure, without raising any process to that effect, that is, without process of declarator of irritancy, for that is not consistent with law as at present settled. The irritancy, in so far as it is legal, is beneficial to the granters, but the want of it would not affect the reality of the burden.

" 2. There is an obligation on the disponee to erect an iron railing eight feet from the houses, an obligation to carry off the eaves-drop, servitudes *tigni immittendi et oneris ferendi* in favour of the adjoining feuars, and an obligation to lay a foot-pavement opposite to and along the sides of the feu. All these are manifestly, from their nature, real burdens, though neither declared to be so in express terms nor fenced with irritancies, having all the requisites mentioned above to render them effectual as such.

" 3. There is a condition that the vassal shall pay a proportion of two third parts of the expense of forming and enclosing the area in the middle of the square, and of upholding it in complete repair. That is not a real burden, for it is an obliga-

tion to pay an indefinite sum of money, which cannot be imposed by the law of Scotland. On this point it may be proper to explain, that an obligation *ad factum præstandum* may be enforced, and is so every day, though indirectly and practically it may resolve into payment of an indefinite sum. Thus it is one of the usual mill services, that the vassals of the sucken shall bring home mill-stones when required, and clear out the aqueduct when it becomes filled with mud and rubbish. This, in general, can only be done by hiring labourers to perform the work, whose wages the vassals pay, in proportion to the extent of their feus or the nature of their thirlage. But these obligations are unquestionably real burdens, because the fact to be performed is in itself specific, whatever means the vassal may resort to for his own convenience in accomplishing it. There is accordingly a finding in the interlocutor proceeding on that familiar distinction. An obligation to pay a proportion of the expense of keeping certain wells in repair is of the same nature.

“ 4. There is a prohibition to tan leather, to refine tallow, to make candles, to slaughter cattle, and various other nuisances, which, laying out of view the circumstances of this particular case, are all of a nature to bind singular successors, without being declared in express terms to be real burdens, or fenced with irritancies, because they are lawful conditions of the grant.

“ 5. The next obligation is to pay £18, 2s. 6d. per annum as ground-rent, which, though not a feu-duty, is in some respects of the same nature ; and it is properly fenced with an irritancy, which would have been useless in a feu-right, because it may not have the benefit of the Statute 1597, this being a burgage-holding. There is a declaration that the ground-rents shall be real burdens, affecting the ground and the houses built upon it. That, however, is not for the purpose of transmitting the obligation against singular successors, but to explain that the disponent shall have the benefit of real diligence against the tenants and possessor of the subject for his own relief.

“ The last condition is of more doubtful effect than any of the rest. It is provided, ‘ that the said George Nicol, and all succeeding heirs and singular successors to him in said piece of ground, shall be obliged, within six months after their acquiring right thereto, to grant, upon their own expenses, personal

TALLOES OF  
ABERDEEN  
v.  
COUTTS.  
1840.

TAILORS OF  
ABERDEEN  
v.  
COUTTS.  
1840.

obligations for payment of said duties or ground-rents, and performance of the whole clauses and conditions prestable by them therein contained, and that without prejudice of the real right competent to the said John Finlason and his foresaids in virtue of said disposition, and of this infestment thereon.' There is no doubt that parties intended this to be a real burden, and to attach upon singular successors, for so it is expressly declared, but whether the law will sanction such a burden is a different question. Certainly, as is admitted, it could not oblige singular successors to grant a personal bond for the performance of conditions which were not or could not be made real burdens in the grant. In the next place, it rather appears to be a condition inconsistent with public policy, vexatious to the vassal, and an obstacle to the free commerce of land, because it ousts him of many advantages which he would otherwise enjoy at common law. When real burdens are enforced against him in the ordinary manner,—for example, if he is required to build a house, to lay a pavement, to inclose an area, and so forth, within a limited time,—and if he fails to do so within the time specified, the irritancy cannot be declared until the ordinary *induciæ* of a summons have run, and until defences have been stated, and decree of declarator obtained and extracted. But if he has granted a personal bond to do these things, he may be charged on letters of horning at six days' date, and could not obtain suspension without finding caution perhaps to a great amount. Keeping this in view, and also that such clauses are extremely rare, and, as far as it appears, have neither authority nor decision in their support, we doubt whether they might not be considered in the same light as the clause in Campbell of Blytheswood's charters was by the minority of the Court; an opinion which received countenance in the House of Lords, both when the remit was made, and when the judgment in this case was moved. If it be a legal and warrantable condition in any case, it seems to be so in regard to feu-duties or ground-rents, the precise amount of which is liquidated in the charter or disposition, and for withholding payment of which there can scarcely even be an excuse.

“ II. The second question is, ‘ If any one of the obligations

is such as to be a real burden, without being so declared, is the irritancy necessary to make it binding upon singular successors ?

“ This question appears to involve its own answer. If an obligation in a feu or burgage right is real, it binds singular successors ; if it does not bind them it is not real, but personal. An irritancy is often a convenient mode of enforcing a real burden, but not necessary to constitute it, except, as has been explained, in the case of strict tailzies, with which at present we have nothing to do.

“ III. The third question is, ‘ Are any of the obligations, and which of them, of such a nature that the irritancy would not make them binding upon singular successors as real burdens, without words declaring them real burdens ?’

“ An irritancy will not make a personal burden real, although, when the words are otherwise not sufficiently precise, it may be of use to explain the intention of parties. For example, in the case of *Martin v. Paterson*, no irritancy would have made the payment of the sum mentioned in the infestment a burden upon singular successors, the Court holding the words employed not sufficiently clear : but they might have taken it into view in construing those words. Thus, in *Cumming v. Johnston*, or *Canham v. Adamson*, a case mentioned when the judgment was moved, the disponee of a burgage tenement was burdened with the payment of a specific sum to a creditor of the disponent, and the Court at first found that the creditor had only a personal right. There was an irritant clause in the disposition, but it was not repeated in the infestment, and therefore absolutely unavailing against singular successors. But as the burden itself, though without the irritancy, appeared in the infestment, they afterwards sustained it as real. This judgment perhaps went too far, according to our present notions of the law, and it can only be justified by giving the irritant clause the effect which has among other circumstances been mentioned, that of being an element of construction.

“ IV. *Fourthly*, it is asked, ‘ Is there any difference, and what, between the effect of an irritancy which forfeits the right of the singular successor only, and one which gives the feu back to the superior, in making the obligation to which it is annexed binding upon singular successors ?’

TAILORS OF  
ABERDEEN  
v.  
COUTTS.  
1840.

TAILORS OF  
ABERDEEN  
v.  
COUTTS.  
1840.

“ An irritancy cannot be declared against a singular successor without giving back the subject to some person. In feu rights the subject reverts to the superior or his heirs. In burgage holdings it reverts not to the superior, who is the sovereign, but to the granter of the burgage disposition. In strict entails, when an irritancy is declared the contravener is struck out of the destination, and the fee descends to the heirs of his body, if the forfeiture is not directed against them, and if so, to the next heir in the destination after the contravener. We are of opinion that there is no difference between the fee returning to the superior in a feu or to the disponent in burgage, in making the obligation to which it is annexed binding upon singular successors. If there was a condition either in a feu or burgage right, of which we never saw an example, that the subject, when the right of the granter is irritated, should go to some third party otherwise unconnected with the feudal or burgage contract, we cannot see how this should affect the quality of the right in the person of the singular successor. A fee forfeited, and reverting to nobody, is altogether anomalous.”

LORD MONCREIFF observed,—“ I think that the whole matter embraced by the remit of the House of Lords is well explained in the above opinion, and I concur therein.”

LORD MEDWYN.—“ I concur in this opinion, with this explanation, that I do not think the principle which prevents the obligation in a disposition to a real subject to pay an indefinite sum of money, being more than personal, or binding on a singular successor, applies to the obligation in a burgage disposition or building feu-charter, to pay two-thirds of the expense of forming and inclosing the area of the square, and of repairing and keeping it up. The expense is indeed indefinite, but it is as precise as its nature will admit, and it is not unlimited ; it never can exceed the limited proportion of the actual expense, and it is a natural obligation in such a deed, as much as building according to a plan or any other *facta præstanda* connected with such a feu ; it is, in fact, the equivalent or commutation for an obligation *ad factum præstandum*, and in this respect is quite different from a condition which converts the feu-charter or burgage holding into a security for a loan of money, which is not one of the *naturalia* of the right. An obligation to pay



the stipend belonging to other lands, although the amount cannot be specified, (*Johnston v. Ramsay*, 20th November 1824,) has been sustained against a singular successor, when properly constituted a real burden; and I think this obligation as to the expense of keeping up the area of the square will always affect the purchaser of the house, and that the superior or other proprietors will have no occasion to look after the heirs of the original feuar, who may have ceased to have any concern with the subject, and claim the amount from them."

TAILORS OF  
ABERDEEN  
v.  
COUTTS.  
1840.

The LORD PRESIDENT and LORD COCKBURN agreed with Lord Medwyn.

LORD MEADOWBANK.—"I concur in the opinion of the other Judges and the preceding addition."

THE LORD JUSTICE-CLERK.—"I concur also in this opinion, but have the same doubt as that expressed by Lord Medwyn, and am disposed to hold that the stipulation as to payment of two-thirds of the expense attending the enclosure of the area of the square is effectual."

LORD GLENLEE.—"I concur in the foregoing opinion, but at the same time I think what is stated by Lord Medwyn deserves great attention. I am not aware of any precise judgment hitherto pronounced on the point stated by his Lordship, and I do not think it quite clear that the considerations which led the Court, after various contradictory decisions, to establish the general rule, that where the burden consists in payment of a sum of money the sum must be exactly and precisely specified, necessarily apply to the case in question."

LORDS FULLERTON and CUNINGHAME.—"While we entirely concur in the exposition given in Lord Corehouse's opinion, of the general principles by which questions similar to the present are to be determined, we must be permitted to doubt how far the application of those principles does in some particulars warrant the special conclusions there arrived at."

"In the first place, we agree with Lord Medwyn, that the obligation to pay a certain 'proportion of the expense of inclosing the area,' &c., does constitute a burden effectual against singular successors in the title of an urban property like the present. It seems to us merely the pecuniary commutation of an obligation, which, if expressed in the form of an obligation

TAILORS OF  
ABERDEEN  
v.  
COUTTS.  
1840.

*ad factum præstandum*, would have been perfectly good, agreeably to those general principles on which various others have been supported. It would be difficult to distinguish it from the obligations to erect an iron railway or to lay a foot pavement, except in the immaterial circumstance that the latter are imposed on the disponee singly, while the former is imposed on him jointly with the other burgage tenants.

“ Still less does it differ from such an obligation as that which was sustained in the case of the Duke of Argyle against the creditors of Tarbert, ‘ to keep and uphold a boat with six oars,’ &c.

“ *Secondly*, We have great difficulty in holding that the obligation on George Nicol, his heirs and singular successors, to grant personal obligations, for the performance of such of the clauses and conditions as are in themselves real burdens, is objectionable and ineffective. It is framed in terms which seem to be sufficient to render it real, and it does not appear to us to involve anything either inconsistent with public policy or even prejudicial to the private interest of the parties. It does no more than bind each singular successor to undertake, in the form of a personal obligation, that which *ex hypothesi* is already a real burden, and of which consequently he has, by taking the lands, contemplated the performance ; and its only effect is to place the singular successors in the same situation as the original acquirer of the right.

“ The stipulation is certainly unusual, and we therefore give this opinion with some diffidence ; but, advised as we are at present, we are not prepared to hold it to be ineffectual.”

Lord  
Brougham.

The case having returned to the House of Lords, LORD BROUGHAM observed,—“ The doubts raised by the opinions of the learned Judges refer, *first*, to the payment of the two-thirds of making and repairing the square ; and, *secondly*, to the granting personal obligations for paying the duties and performing the clauses and conditions. On the last of these points I think it would not be right to deviate from what appears to be the opinion of nearly the whole of the learned Judges, and what is consistent with the view taken both in the Blytheswood case when it was before your Lordships, and in 1837, when the present case was sent back ; namely, that such an obliga-

tion is ineffectual, although intended by the words of the conveyance to be made a real burden. On the former I have much more hesitation, but I have come to the opinion of those who hold it not to affect the party. Here the conveyance does not declare it a real burden ; there is nothing to show (in the words of the learned Judges) ‘ that the subject itself is meant to be affected,’ and it is not one of the necessary or natural burdens of such rights. It is not ‘ *ad factum præstandum*,’ at least not directly or immediately, but only to pay a proportion of the expense occasioned by a certain fact, if done. It is an obligation to bear an unascertained expense, that is, an unascertained sum of money, which it is on all hands agreed cannot be imposed ; and it by no means follows, that because the property might have been burdened with the whole inclosures and repairs of the square, therefore it may be burdened with relieving those who shall inclose and repair,—relieving them to a certain extent of the sums required for that purpose. On the contrary, such an obligation would really be converting the feu-charter, and in this case the burgage holding, into a security for an amount,—and an undefined amount of money.

“ In a matter confessedly of some nicety, and on which I have had great doubts, it seems the safe course to consider this obligation as it directly and apparently is,—an obligation to pay an indefinite sum, unconnected with the *naturalia* of the right. The obligation to pay the expense or any proportion of the expense of repairing, immediately connected with the subject granted, would clearly stand in a different predicament. In the case referred to below, *Johnston v. Ramsay*, 20th May 1824, the obligation was a warrandice of teinds against stipend expressly declared to be a real burden in the sasine ; and the learned Judges have not said in the present case that an obligation, such as the present, can be effectual against singular successors when not declared a real burden, and when the obligation is not to a feudal superior, but to the grantor of the right, when there is no feu-holding.”

The judgment of the House of Lords was as follows :—“ The House of Lords Ordered and Adjudged, That so much of the said interlocutor of the Lord Ordinary of the 19th of Novem-

TAILORS OF  
ABERDEEN  
v.  
COUTTS.  
1840.

JUDGMENT.  
House of Lords,  
Aug. 3, 1840.

TAILORS OF  
ABERDEEN  
v.  
COUTTS.  
1840.

ber 1833, appealed against in the said appeals, as finds that the defender is not bound to grant to the pursuer, for behoof of the corporation, a personal obligation for payment of the yearly dues or ground-rents specified in the libel, or for the performance of the clauses and conditions contained in the articles of roup or the burgage disposition granted by John Finlason, box-master of the corporation, in favour of George Nicol; and so much as finds that the defender is not liable to pay to the pursuers or their successors in office the sum of £16, 6s. 6½d., with interest, as part of the expense of erecting the metal railing and dwarf wall round the centre of Bon Accord Square; and so much as finds that the defender is bound to lay the foot pavement opposite to and along the sides of the subjects disposed to George Nicol, and to erect an iron railing to the east end of the said subjects, in conformity with the provisions in the burgage disposition, and within the time therein mentioned; and so much as finds that the defender is not bound to lay the pavement at the west end of the subjects fronting Bon Accord Terrace, there being no obligation to that effect in the disposition to George Nicol; and so much as finds that the defender is liable to the pursuer in the sum of £27, 14s. 2d., being his proportion of erecting a common sewer, of which he has taken benefit since his purchase from George Nicol, with interest, as libelled,—be and the same is hereby affirmed. And it is further ordered, That as to so much of the said interlocutor as assoilzies the defender from all the other conclusions of the libel, it be remitted to the Court of Session, with this direction, that in respect of the declaratory conclusion of the summons against the defender as a singular successor disponee of George Nicol, the said Court do decern and declare, in terms of the said interlocutor, that the obligation of the defender to lay the foot pavement opposite to and along the sides of the subjects disposed to George Nicol, and to erect an iron railing at the east end of the said subjects, in conformity with the burgage disposition, and within the time therein mentioned, is a real burden upon the property in question, and is binding on the defender; and that the said Court do of new assoilzie the defender from all the other conclusions of the libel, and that they do decern accordingly."

1. In the case of *PRESTON v. THE EARL OF DUNDONALD'S CREDITORS*, March 6, 1805, Sir George Preston, in 1745, feued out a piece of ground called Kirkbrae to General Cochrane, absolutely and irredeemably, and the right was completed by infestment. The transaction being truly for the benefit of the General's brother Charles, the General thereafter conveyed it to him, and he, of the same date with the disposition in his favour, executed a back-bond in favour of the General, by which he bound himself, his heirs and successors, that before disposing of the subject it should be offered to Sir George Preston for a certain price. Charles Cochrane was never infest in the subject, but he executed a conveyance of his whole property in favour of the Earl of Dundonald. The Earl's affairs having become embarrassed, and his right to the subject remaining personal, the heir of Sir George Preston brought an action seeking to have it declared, *first*, that the lands were in non-entry; *second*, that the Earl of Dundonald was bound to make up titles thereto, so as to make the right of pre-emption effectual against singular successors, by inserting it in his charter and infestment; and *third*, that he was bound to subscribe a new deed *verbatim*, in terms of the obligation sued on, with the clauses proper for enabling the pursuer to register it in the Register of Reversions. The Court, December 20, 1781, Found, "That the tenor of the back-bond in question ought to be inserted in all the subsequent

titles and investitures of the subject." Decree of non-entry was also obtained against the Earl, but no title was ever made up, and consequently the obligation in the back-bond was never engrossed in any investiture.

2. An action of sale having been afterwards brought by the Earl's creditors, Sir Charles petitioned the Court, praying that the lands of Kirkbrae might be struck out of the order for sale. The Court, February 9, 1797, Found, "That the petitioner had right to redeem the lands of Kirkbrae on payment of the sums mentioned in the petition." Lord Dundonald reclaimed, but his petition was refused without answers. Having reclaimed a second time, Memorials were ordered, and on advising these the Court, November 21, 1798, Found, "That the right of pre-emption claimed by Sir Charles Preston in virtue of the back-bond is not a real burden upon the lands of Kirkbrae, and consequently cannot be effectual against creditors, and therefore that these lands must be sold for payment of the debts due by the common debtor in terms of the act of roup." Sir Charles having reclaimed, the Court "Adhered."

3. On the Memorials in the cause, LORD PRESIDENT CAMPBELL has written,—“Personal and Real. The obligation was of a personal nature, not real, in a question with creditors or purchasers, nor would the insertion of it in the investitures (which has never yet been done) alter its nature so as to make it a real lien. The

Court seems only to have meant by the former judgment that the pursuer had a right to have it inserted *valeat quantum*. Besides, the principle of the decision in the case of Ross of Kerse seems to apply." — *MS. Notes, Sir Ilay Campbell's Session Papers*.

4. Sir Robert Preston, the brother of Sir Charles, having appealed, it was ordered and adjudged, April 13, 1802, "That the cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of; and particularly, to find whether the back-bond given by Charles Cochrane, (30th June 1750,) as mentioned in the pleadings, is not a real burden on the lands of Kirkbrae, it having been found by the interlocutor of 20th December 1801, that the tenor of the back-bond and obligation libelled on, ought to be inserted in all the subsequent titles and investitures of the piece of ground in question, which, by the decree of the Court of Session, in a process of non-entry, remains in the superior's hands, together with the mails and duties thereof, and will so continue, aye and until the lawful entry of the righteous heir; and also to find, whether the terms of said back-bond, supposing it a real burden, are not sufficient to entitle the appellant to a pre-emption."

5. When the cause came back to the Court, Memorials were ordered, and a hearing in presence took place. On 9th July 1803, the Court Found, "That the back-bond given by Charles Coch-

rane is a real burden on the lands of Kirkbrae, and therefore find that Sir Robert Preston has right to redeem those lands upon payment of the sums mentioned in the petition." The common agent for the creditors, and the purchaser reclaimed, and on March 6, 1805, the following interlocutor was pronounced:—"The Lords find, that Charles Cochrane, who granted the back-bond in question, in favour of Sir George Preston, had only a personal right to the lands of Kirkbrae, which never was completed by infestment, either in his favour or in that of his successor Lord Dundonald: Find, that the said back-bond never was inserted in the title of the said lands, though ordered to be so by the interlocutor of this Court, in 1781: Therefore, find it unnecessary to determine whether, if the back-bond had been so inserted in the titles, and infestment had followed, it would or would not have constituted a real burden on the lands: But find, that the personal right in Charles Cochrane, and his successor Lord Dundonald, did remain qualified by the condition in the said back-bond in favour of Sir George Preston; and that the adjudication led by the creditors of Lord Dundonald, can only attach the said personal right, subject to the said condition: Find, that such interest as Lord Dundonald has in said lands, is properly comprehended in the summons of sale; and therefore find, that Sir Robert Preston has now right to redeem said lands, on payment of the sum of £307, 13s. 4d.

mentioned in said back-bond ; and decern accordingly."

6. In the case of *CAMPBELL v. HARLEY and DUN*, a superior brought an action to reduce a disposition of his vassal which was offered by the purchaser from the vassal for confirmation, on the ground that it had been granted in violation of a clause in the original feu-contract, by which it was provided that dispositions by the vassal should be made out and extended by the agent of the superior, otherwise to be void and null. The Court reduced and decerned in terms of the libel. Lord Gillies strongly *dissented*, on the ground that the superior had no true interest to insist on the condition that his own agent should make out the charters, that for enforcing the other conditions he had all the lawful aids, and that the condition was not a real burden, and therefore not such as to affect third parties. The *majority* of the Court held that the superior had a material interest in insisting on the condition, that being inserted in the titles, the feudal right was effectually burdened with it against all the world, and that the superior, though not bound at common law to confirm, was here bound to do so under the prescribed conditions, and that the conditions not being *contra bonos mores*, were effectual as real qualities of the right. The vassal having appealed to the House of Lords, the case, on June 29, 1845, was remitted back for review, and to obtain the opinion of all the Judges.

7. On the remit the opinions of the consulted Judges were returned, but thereafter the pursuer lodged a minute, in which he stated that he agreed not to insist farther in the case, and consented that a decree of *absolvitor* should be pronounced in favour of the defenders, and judgment was pronounced accordingly. The import of the opinions returned by the consulted Judges is thus given by Professor Bell in his *Illustrations*. He observes,—“The consulted Judges differed greatly in opinion ; six Judges (Lords Justice-Clerk, Glenlee, Pitmilley, Newton, Meadowbank, and Medwyn) held the conditions to be effectual ; that conditions introduced in a feu-contract qualify the right, and entitle the superior to bring a reduction ; that the interest to insist on this condition is lawful ; that the clauses against subinfeudation and for regulating the granting of the conveyance, are not against the Act of Geo. II. ; that this condition does not constitute a real burden on the lands, but is binding on purchasers, who can have no real right but by aid of the superior, who is not bound to receive him on any other terms than those lawful conditions which he has stipulated in the feu-contract. Lords Glenlee and Newton, however, held that the libel should be restricted so as to reduce the deeds only so far as the superior was concerned. Four Judges (Lords Alloway, Cringletie, M'Kenzie, and Eldin) were of an opposite opinion ; that on the special case, the estate was feued

under an Act of Parliament, which required the highest feu-duty to be secured, and yet this condition had a direct tendency to lower the value and of course the feu-duty; that it is a clause unnecessary to the superior's protection, dangerous and prejudicial, and therefore vexatious, and also illegal by 1592, c. 140, as against law, equity, and reason; that it is also inconsistent with the 20th Geo. II. c. 50; and that it truly is not a real burden, but a personal obligation merely, not effectual against third parties."—*Bell's Illustrations*, vol. ii. p. 75.

8. The opinion of the *minority* of the consulted Judges as to whether the condition affected singular successors was as follows:—"We are inclined to think that the provision in favour of the agent of the trustees, or heir of entail, unless it could be viewed as resting upon a valid general prohibition to alienate *sine consensu superioris*, from which dispositions written by that agent only are excepted, (which is not possible,) is of such a nature as not to form a real condition affecting singular successors. It does not appear to be any part of the property reserved to the superior, nor any servitude known to the law, nor any feudal casualty, nor any burden to be made good out of the property as a real burden, or in security of which an infeftment in the lands could be given. We cannot see how it can be made real upon the lands, more than if it were stipulated that the vassal should always come to Glasgow

by a particular coach, or employ a tailor, butcher, baker, or doctor, to be named by the superior. But it is perhaps not necessary to go into that, as the present is not a declarator of real right burdening or affecting the lands, but a reduction of the disposition and infeftment as wholly void."

9. The opinion of the *majority* of the consulted Judges on the same point was in these terms:—

"If it were essential that the condition in question should be held to be a real burden, before it could affect singular successors, we would be of opinion that it was not binding on them. The condition does not constitute a reservation of part of the property to the superior, or a limitation on the vassal's right. It is not a servitude known and recognised in law—nor a feudal casualty, or any other of the *naturalia* of a feu-contract sanctioned by custom and usage—nor any specific pecuniary burden to be made effectual out of the property, and which has been declared a real burden on it. Yet although the condition be in its own nature personal, and perhaps not capable of being made real, so as to bind singular successors who obtain a feudal right of the property, it seems to us in this case to be binding upon the purchaser from the vassal; because, having only a personal right in the lands, and not having it in his power to acquire any other without resorting to the superior, the superior is entitled to say, when the purchaser asks for confirmation of the transmissions in his favour, that he



must be liable to all the conditions which he saw limiting his author's right—even those that are personal; and that he will refuse to grant confirmation, if the vassal has not complied with the conditions incumbent on him, and which were known to the purchaser, who saw them in his au-

thor's title. Hence, if the condition be not in itself illegal, it seems to fall under the ordinary rule of personal qualifications of the author's right, which limit and affect his successor, who has only a personal right to the subject, and as long as he has no higher right."

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*In order that an obligation in favour of the Disponer may run with the Land, and so be effectual against Singular Successors, it is necessary that it be declared a real burden on the land, and not conceived as a burden upon the Disponee merely.*

BAIRD'S TRUSTEES v. MITCHELL.

IN 1808 Robert Cathcart feued to Messrs. Wight and Armstrong the coal-seams under a part of the lands of Drum. The feu-disposition was granted under the condition that the disponees and their heirs and disponees should pay all damages that might be occasioned to the lands and mansion-house of Drum by the operations and working of the coal; and this condition was appointed to be engrossed in their infeftment, and all future transmissions and infeftment of the coal, under pain of nullity.

Feb. 6, 1846.

NARRATIVE.

The clause imposing the conditions was in these terms:—  
 "With and under the farther condition that the said Alexander Wight, William and Adam Armstrong, and their heirs and disponees whomsoever, shall pay, jointly and severally, all damages of every description which may be occasioned to the mansion-house, as well as all other damages which they may occasion in working the said coal, and that so soon as such damages may be ascertained. All which burdens, conditions, and restrictions foresaid, shall be engrossed in the infeftment to follow hereon, and in all future dispositions, conveyance, and transmissions or investitures of the said coal and others, or of these presents,

BAIRD'S  
TRUSTEES  
v.  
MITCHELL.  
1846.

and in the infestment thereon, otherwise the same shall be null and void." A precept for infesting the disponees was granted, "but always with and under the burden of payment of the said price of £17,700, and also under the other burdens, conditions, provisions, and declarations before specified, and here also held as repeated *brevitatis causa*; but which shall be all verbatim engrossed in the infestment to follow hereon, and in all dispositions or conveyances of the subjects above disposed, or any part thereof, otherwise the same shall be void and null."

Infestment passed in favour of the disponees in terms of the disposition, the whole burdens expressed in it being engrossed in the sasine. The disponees having become bankrupt, the coal was purchased from their trustee by Mr. Innes of Stow, who was succeeded by the defender. Certain parts of the lands of Drum were sold by Mr. Cathcart, in 1809, to Mr. Robert Baird, and thereafter became vested in the pursuers, his trustees.

An action of damages was brought by Mr. Baird's trustees against the defender, on the ground that Messrs. Wight and Armstrong, the original disponees to the coal, had caused great and permanent damage to the land by their operations in working the coal.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—By the terms of the title-deeds, the obligation to pay damages was constituted a real burden upon the coal. For this end no *voces signata* or technical form of words are necessary. It is enough that words are used which express or plainly imply that the subject conveyed is to be affected, and not merely the grantee and his heirs. The appointment of the insertion of the burden in the infestments and future transmissions, shewed the intention that the subjects themselves should be affected by it. It was a burden or obligation, having a *tractus futuri temporis*, that might emerge from time to time, so long as the coal should be wrought; so that to suppose it not to have been meant to affect the subject and singular successors, was to suppose it to have been meant to have substantially no proper effect. To argue from the indefinite nature of the obligation, that it could not be created a real burden, is to contend, that in feuing out the coal as a separate property from the surface, it was impossible to impose on the

coal estate and on singular successors, into whose hands it might pass, a liability for the damage which might be caused to the land by the working of the coal. It was a natural arrangement that the coal estate should be burdened with the damages which, in the course of working it, might be caused to the surface. The burden was no farther indefinite than other burdens which are admitted to affect singular successors, and it was declared as specifically as such a burden could be stated. Any burden may be made real which is not inconsistent with the nature of property, useless or vexatious in itself, or contrary to public policy. It is only where the burden consists of the payment of a sum of money, that it is necessary to specify the amount.

BAIRD'S  
TRUSTEES  
v.  
MITCHELL.  
1846.

PLEADED FOR THE DEFENDER.—The feu-disposition contains no expressions indicative even of an intention to create a real burden. The words actually employed are those proper to the constitution of a personal obligation, and nothing more. In order to create a real burden the law requires words which clearly express that the subject itself was to be affected, that it was not merely a personal obligation on the disponees. The law farther requires, where the conditions are of a pecuniary nature, that the amount of the sum should be precisely specified.

ARGUMENT FOR  
DEFENDER.

LORD WOOD, Ordinary, having reported the case, the Court "Found that the condition, as to the payment of damages that may be occasioned by the working of the coal, has not been constituted as a real burden on the heritable estate of coal, in the titles by which the said coal is feued out: Therefore assoilzie the defenders from the conclusions of the libel, and decern."

JUDGMENT.  
Feb. 6, 1846.

LORD JUSTICE-CLERK HOPE observed,—“Under this clause the pursuers contend that damages occasioned by the workings of the disponees thirty-eight years ago, and nearly twenty before the purchase by Mr. Innes, who has never worked the coal, whether such damages appeared during the possession of these disponees, or have manifested themselves subsequently, (assuming both to be under this summons, which I doubt,) are created a real burden on the lands by the above clause, and thereby fall on singular successors.

OPINIONS.

BAIRD'S  
TRUSTEES  
v.  
MITCHELL.  
1846.

“ As a point of conveyancing, I think the matter as clear as any point can well be. The title merely provides, *first*, that the *disponees shall pay*,—*secondly*, jointly and severally also, which last expression denotes very specially the character of the provision, all damages which they may occasion. Surely this merely takes the grantees bound to pay, and goes no farther. It is an example of the very case which all the authorities state as the contrast to a burden on the lands. While it is in a certain sense true that no particular forms of expression are prescribed as essentially requisite to constitute a real burden, yet, on the other hand, it is as clear that terms must be used which are capable of affecting, and do validly and effectually subject, the lands themselves, and not the grantor and his successors alone, and this must be done in proper form. The lands must be burdened and affected. The clause above quoted has not one word capable of affecting the lands, and making the obligation a real burden. It is framed in the very terms given by Bankton as an illustration of what is not a clause sufficient to affect the lands. It seems to be precisely the case of *Creditors of Caxton v. Duff*, decided in the House of Lords in 1772.

“ This is so clear and plain to me as matter of conveyancing, that I think it quite unnecessary to test the point by any of the canons or rules stated in the Opinion of the consulted Judges in *Coutts*, and generally concurred in. At the same time, in several respects, some of these rules would directly apply, if any doubt could be raised on the terms employed in the deed.

1. The alleged burden is the payment of an indefinite sum of money—not only a matter unconnected with the *naturalia* of the right, as Lord Brougham said, but unavailing, as inconsistent with the law of Scotland as to the tenure of land.
2. It is an obligation not capable at any one time of being ascertained and extinguished; and while in some respects, if there is continuance in the subject-matter of the obligation, that may aid the construction for real burden, yet it is quite otherwise when it is of the nature of an obligation to pay damages which may draw back for forty years, while a singular successor has no means either of knowing the existence of the claim, or its non-payment.
3. The burden must be apparent on record to the purchaser, as an obligation actually attaching to the lands when he purchases

—as, for instance, the obligations respecting property in building areas, to be fulfilled on the completion of the plan, and which not being performed are manifestly still burdens under which the property is to be taken, and so were held to be real burdens or binding singular successors in Coutts' case, according to the difference of the terms employed ; while the opposite view was taken of the indefinite burden of paying two-thirds of the expense of forming a square, which was held not to be a real burden. 4. The obligation here cannot be converted into an obligation *ad factum præstandum*.

BAIRD'S  
TRUSTEES  
v.  
MITCHELL.  
1846.

“ I avoid saying anything as to the alleged intention of the parties in framing the deed as to this obligation to which the pursuers appeal, and which they may make available in their other action, for aught I know ; for I venture to doubt whether rather more weight is not given to the effect of intention as to these questions, in the opinion I refer to in Coutts, than that case required, or than the authorities, especially *Martin v. Paterson*, warrant. It may be very necessary for the party contending for the real burden to show that he is not arguing for a construction directly at variance with the objects, and intentions, and true transaction of the parties ; but I very much doubt whether, if the words employed do not validly affect the lands by any proper terms of conveyance, any such defect can ever be supplied, or the effect of doubtful terms in conveyancing aided by views of the intention of parties. I think any such view is inconsistent with the leading principle enunciated in the Opinion of the consulted Judges, and, still more, as it is explained by Lord Brougham, which is, that the lands are free to the singular successor as of the essence of the right of dominion, unless the lands are truly burdened by terms which attach to the lands.

“ But, in the present case, I think there is no occasion to refer to any of these rules ; for, even if the alleged burden were of the very kind generally or always, in similar grants of coal, made real burdens, and if the deed showed clear evidence of an intention to do it here, still the words employed, according to all the authorities, and conformably to the only effect of which they are legally susceptible, cannot be construed so as to affect and attach to the lands, or constitute a real burden, and hence

BAYRD'S  
TRUSTEES  
v.  
MITCHELL.  
1846.

must be unavailing against a singular successor to make that a real burden which is not attached to the lands. The intention, if it can be made out, may be very relevant in the new action, in which the pursuers seek to establish that a purchaser, by the very act of acquiring the lands, subjects himself in the liability in question ; but the intention is unavailing in this action.

“ It is of more use to refer to the rest of this very deed, in the question of construction ; for the distinction between the terms necessary to subject the lands, and obligations to bind the disponees and their successors, is in this deed itself strongly marked.

“ Of course it will be understood that I intend to indicate no opinion as to the personal claim against successors, although singular successors, founded on this claim, and I have endeavoured to use terms which avoid any indication of opinion.”

LORD MEDWYN.—“ I am of opinion that there is no obligation, as under a real burden on the proprietor, to be liable for damages arising out of the acts of his predecessor, and prior to his own acquisition of the property. I think that no real burden as to the payment of surface damages was intended even to be created ; but, at all events, that none was created by the disposition to the coal in 1808. There is a marked distinction between the price, which is made a real burden on the land, and the payment of damages, which is only mentioned as a condition on which the coal is acquired by the disponees, that they shall pay them jointly and severally,—and no attempt to attach the obligation to the subject itself. There is no attempt to dispoise the coal under a real burden to this effect ; it is only under condition that they shall pay ; and this, I think, just means nothing more than that they are to be liable for the damages arising from their working during their possession, or which can be shown to arise out of their working. I do not say that it is necessary to use express words declaring it so, provided the burden be by a sufficiently apt clause imposed, but at least this must be very carefully done. Here clearly it is, not so done ; and, more especially, I am not to infer either the intention or the act burdening the land, as it would be an obligation to pay damages to an indefinite extent—not one of the *naturalia* of such a feu-right—and no real burden of that kind can be

enforced by the law of Scotland. This being my opinion, it is unnecessary, perhaps, to consider the effect of the subject having been acquired by Mr. Innes at a judicial sale; and, as it may affect the personal claim, it is better that I should say nothing about it."

BAIRD'S  
TRUSTEES  
v.  
MITCHELL.  
1846.

LORD MONCREIFF observed,—“ I am of opinion that the obligation to pay whatever damages should be occasioned by the working of the coal was not legally constituted a real burden on the coal itself, or the lands of Drum, by the original feudisposition by which it was imposed on Wight and Armstrongs, and their heirs and disponees. I think this much clearer in the present case, than a similar question which has occurred in numerous cases, in which it has been held that no real burden had been created. The general principle is shortly stated by Mr. Bell in his Principles, §§ 917 and 918, thus—‘ A real burden reserved is effectually constituted, where, in a conveyance of land, a specific sum is declared (in terms appropriate) a burden on the land and on the right of the disponee.’ ‘ In point of expression, it is necessary, 1. That the burden shall be specifically and pointedly stated as a real debt and burden on the lands disposed, the strongest expression of mere personal obligation, though conditional, being insufficient; and, 2. That it must be precise and clear in amount,’ &c. In like manner, in the opinion drawn by Lord Corehouse, on which the judgment of the Court and the House of Lords proceeded, in the case of the Tailors of Aberdeen *v.* Coutts, (House of Lords, August 3, 1840, 1 Rob. 306,) the rule is thus generally laid down—‘ To constitute a real burden or condition, either in feudal or burgage rights, which is effectual against singular successors, words must be used in the conveyance which clearly express, or plainly imply, that the subject itself is to be affected, and not the granter and his heirs alone, and those words must be inserted in the sasine,’ &c.

“ Considering the question according to these texts, I think that there is not here anything like the terms necessary for constituting a real burden on the subject. The provision is distinctly, that Wight and Armstrongs, and their foresaids, ‘ shall pay, jointly and severally, all damages,’ &c. There is not an attempt, by any form of words, to attach the obligation

BAIRD'S  
TRUSTEES  
v.  
MITCHELL.  
1846.

to the heritable subject itself; and although it is directed against their heirs and disponees, this can only be taken as referring, at the utmost, to their disponees, who may be in the right and possession of the subjects at the time when the damage is alleged to have been occasioned by the workings of the coal, &c.

“ It is besides to be observed, that the obligation in this case, though distinctly for the payment of money, is of a very indefinite and uncertain nature—a consideration which renders it inconsistent with the nature of feudal rights in the law of Scotland, to hold it as effectually constituted by any such loose and inappropriate terms as those here employed.

“ The point might easily be illustrated by reference to many other cases, such as that in the House of Lords in 1722. But I think it unnecessary. The inefficiency of the words is much clearer in the present case than it was in several of the doubtful points in the case of Coutts, or in any of the other cases in which the words would have been found insufficient.”

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*The right to claim a share of the expense of a mutual gable from the adjoining proprietor is a real right, and passes by a Conveyance of the Tenement, without any special mention of it.*

STEWART'S TRUSTEES v. WILSON'S TRUSTERS.

June 2, 1846.

NARRATIVE.

DAVID STEWART purchased a building stance in Dundee from the Magistrates of the town, and obtained a conveyance from them in the form of a feu-contract. The deed provided that he, and also the other purchasers of lots in the same street where there are mutual gables, should each pay an equal share of the expense of building the gable, and that in every case where a mutual gable was finished by a purchaser, he should be entitled to claim the expense of building the half of it from the purchaser of the adjoining lot.

Stewart was infest, and built a tenement on his stance with the requisite mutual gable. He afterwards borrowed £550



from the trustees of William Wilson, and granted security over a shop and back-shop, being part of the tenement he had built, in the form of an *ex facie* disposition, qualified by a back-bond. Upon this disposition Wilson's trustees were infeft. Stewart afterwards became bankrupt and was sequestrated. The Dundee Joint-Stock Company had purchased the building stance adjoining Stewart's, and entered into a feu-contract with the Magistrates on the same terms. The trustee in Stewart's sequestration required payment from them of the half of the mutual gable. Wilson's trustees having also claimed that portion of the sum which was applicable to the subjects conveyed to them, a multiplepoinding was raised before the Sheriff in name of the Joint-Stock Company. Stewart's trustee pleaded that the claim was personal, and that not having been specially assigned to Wilson's trustees, it did not pass to them in virtue of the disposition by Stewart in their favour. Wilson's trustees pleaded that the claim was real, and that it was carried with the subject in respect of which it was made.

STEWART'S  
TRUSTEES  
v.  
WILSON'S  
TRUSTEES.  
1846.

The Sheriff found, that by the disposition by Stewart in favour of Wilson's trustees, all right, title, and interest, and also all claim of right which belonged to the disponent in the property was conveyed to his disponees, and, amongst others, the half value of building the mutual gable effeiring to the shops disposed.

Stewart's trustee having advocated, Lord Wood, Ordinary, adhered.

The advocator having reclaimed, the Court "Adhered."

LORD PRESIDENT BOYLE observed,—“I don't entertain the slightest doubt of the soundness of the interlocutor. It is clear, when you look to the terms of the original feu, and also to the terms of the bond and disposition in security, which raises the same question as an absolute conveyance of the whole subject, that this right to claim one-half of the mutual gable was a right which attached *really* to the subject conveyed by the Magistrates of Dundee. It did not require to be specially conveyed, or made the subject of an assignation. He who built the wall was entitled to get back the half of the expense when his neighbour came to build; but, if he conveyed away the

STEWART'S  
TRUSTEES  
v.  
WILSON'S  
TRUSTEES.  
1846.

house with the wall, this right passed with it. I don't think there is any doubt about the case in principle : but we have the authority of the case of *Wallace v. Brown*, June 21, 1808, which is in point, and confirms the Lord Ordinary's view. I have no hesitation in adhering to the interlocutor."

LORD MACKENZIE.—" I concur. The case of *Wallace* decides this. The data there were precisely the same. It is the common understanding in all towns that where parties get a portion of ground for building, and are bound to erect a mutual gable, and one of them builds it, he is entitled to prevent the other from touching it till he has been paid his half. The right of exclusion is real ; it has nothing to do with personality. That was held in the case of *Wallace*. His power of exclusion is very strong, for he can exclude from the whole of the other house. The right is somewhat anomalous ; but it is very substantial. Here the first built tenement is conveyed with all rights and privileges connected with it. A party getting a security is in rather a better situation than a purchaser, for a purchaser may take a limited right, and pay less, which a creditor never does. Here a purchaser was held to be in the same situation as the seller in the case of *Wallace*, and I am for adhering to the rule of that case, which must have been acted on since."

LORD FULLERTON.—" I am of the same opinion. The right to a gable wall is indivisible. When a party sells it, what separate right can he retain to make the subject of separate disposal ? Suppose no adjoining house built, what remains in the seller ? Nothing. Then if the next house is built, who is entitled to claim the price of the mutual gable, except he who can give the right to it ?"

LORD JEFFREY.—" I am exactly of the same opinion. There is not the slightest ground of doubt. The disponent has an actual right to every part of the gable *pro indiviso*. Now, is that a real right, or is it not ? A right of common property is still a right of property, each individual having a common interest as proprietor of every inch of the subject. The case of *Wallace* is exactly the converse and counterpart of the present. The proprietor of the house is the sole proprietor of the common gable, until the party to divide it with him comes in."

existence. He is sole proprietor, with a kind of conventional servitude provided in favour of the party who comes to build on the adjoining stance, to have right to one-half on paying the party who built it, or the party to whom he may have conveyed it. His whole right to the gable was necessarily conveyed by a conveyance of the tenement as it stood."

STEWART'S  
TRUSTEES  
v.  
WILSON'S  
TRUSTEES.  
1846.

1. In the case of *WALLACE v. BROWN*, June 21, 1808, the Trustees of Heriot's Hospital, with the view of a street being formed, fenced out two conterminous areas, the one on the east to Robert Smith, the other on the west to William Wallace. On his area Wallace built a dwelling-house, of which the gable and garden wall were mutual to him and Smith. Smith became bankrupt without either paying the proportion of the mutual gable and wall, or building a house on his area. The trustee on his sequestrated estate exposed the subject to sale under a declaration that "half of the mutual gable on the west was to belong to the purchaser." Wallace became the purchaser, but the Trustee refused to prefer him for half of the mutual gable and wall. He accordingly raised an action for the price, in which Lord Craig, Ordinary, "Found, that although there was a debt due to the pursuer for the erection of the gable in question, yet he has no preference on the subjects in question therefor."

2. The pursuer reclaimed, and PLEADED, that by the plan prescribed to the feuar any person building a house must erect a mutual

gable, that the ground on which the mutual gable stood was common, mutual, and indivisible, that therefore there was no room for the maxim *inedificatum solo cedit* that the gable in question was in fact the property of Wallace till paid for, and till then he had a right to prevent Smith from using it, or adjecting to it any building. The Court altered the interlocutor of the Lord Ordinary, and "Found the pursuer entitled to retain the cost of erecting one-half of the gable out of the price." On the Session papers Lord Campbell has written,—“Mutual gable. Warrantice given that it shall belong to purchaser, *i.e.*, it did not yet belong to exposor, and therefore must be purchased from pursuer, and paid for out of price arising from present sale. Pursuer himself being purchaser, is accordingly entitled to retain it. Can be in no worse situation than any other purchaser. Principle the same as to the mutual gable and the wall. Defender has sold what did not yet belong to exposor, and must guarantee that property—must make a good title to it.”—*MS. Notes, Sir Ilay Campbell's Session Papers.*

## ACCRETION.

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*Where a Party uninfest grants Conveyances to several Parties, and he is himself thereafter infest, his Infestment accresces to the other Parties in the order of their recorded Infestments.*

PATERSON *v.* KELLY.

Dec. 10, 1742.

NARRATIVE.

IN 1732 John Girdwood purchased some lands from David Aikman. In the same year, while still uninfest on the disposition in his favour, he granted an heritable bond to Kelly, and in 1733 he granted another heritable bond to Paterson, upon which Paterson was infest in 1734. In 1735 he granted another heritable bond to Kelly, and in 1737 Kelly took infestment upon his two heritable bonds, and at the same time he procured the infestment of his author also.

Paterson having raised a process of maills and duties, Kelly appeared, and craved to be preferred to him, or at least that he should rank *pari passu* with him.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—As soon as the common debtor was infest, his infestment accresced to those to whom he had granted infestments, according to the respective dates of their infestments.

In order to establish this position, it is necessary to examine the nature of the *jus superveniens*, and what effect is given to it in law. One disposes an estate, of which he is not proprie-

tor, and the purchaser stands infest, and thereafter, the seller acquires a complete title to the subject. The law says that there is no necessity for a second disposition. Nor, indeed, seems there to be, from the nature of the thing, for the purchaser has the consent of the proprietor formally interposed. The subject is delivered to him, and this is all that is necessary to transfer dominion.

PATERSON  
v.  
KELLY.  
1742.

If, then, there is no necessity of a second disposition and infestment, after the common author has acquired the right himself, which cannot be disputed, otherwise there would be no such thing as *jus superveniens*, it follows, that the creditor first infest must be preferred. Because, *quoad* the common author, who cannot plead the defect of his own right, the creditor's infestment is unexceptionable *a principio*. The common author, thereafter, can no more effectually deprive the first creditor of his possession, and deliver the subject to another, than if the property had been his before granting the first infestment; and the second creditor, who has nothing to plead, but upon supposition that the common author is proprietor, cannot object against the first creditor's right, derived from the same author. In a word, whether the common author's title, at the date of the infestments flowing from him, was unexceptionable or not, or if he had no title at all, is all the same thing with respect to rights derived from him. The creditor who gets the first infestment, though he may be insecure as to third parties, is absolutely secure with regard to his author, and all those deriving right from him.

PLEADED FOR THE DEFENDER.—No man can give an infestment who is not infest himself. All the competing infestments, therefore, being null, until the common author was infest, they can only be validated at the moment of his infestment, and can only be effectual from its date. The whole competing infestments, therefore, must come in *pari passu*, as if one infestment had been taken for the whole, seeing that the whole were void, in the same manner as if the granter had had no title to the estate. The granter's infestment cannot operate *retro* in favour of the first infestment, for all the intervening ones are so many mid-impediments to the retroactive virtue of the granter's.

ARGUMENT FOR  
DEFENDER.

PATERSON  
v.  
KELLY.  
1742

A right supervening in an author's person accrues to his singular successor, to whom he has disposed with absolute warrandice. Of this there is no doubt, when the question occurs betwixt the author and one singular successor. But where he has disposed the same subject to different persons, for onerous causes, he is equally liable to all of them to make it good ; and the absolute warrandice, competent to the first, being merely personal, cannot be more effectual toward constituting the real right, or accretion of the same, than that which is competent to the second. The title of both is void as a real right, and when considered as a personal one, inferring an obligation upon the author to make good the real right, both are upon a level. It is impossible to imagine that the common author, before he was vested, could be denuded, or that a real right could be constituted, before he had any himself. To suppose the other creditors' infeftments good from their date, were *filius ante patrem*. They must all therefore be preferred equally, as if granted of the very date of the common author's infeftment.

JUDGMENT.  
Dec. 10, 1742.

The Lords " Repelled the exception to the pursuer's infeftment, and found the infeftment, in favour of the common author, operates *retro* to the date of the infeftment in favour of the pursuer ; and therefore found him preferable to the competitor Mr. Kelly, according to the date of his infeftment ; but found the pursuer liable in a proportion of the expense debursed by the competitor, in procuring the common author infeft, effeiring to the lands in question, in proportion to the other lands contained in the other infeftment."

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*Where a party infeft a me, but unconfirmed, grants infeftments to two Creditors, the posterior of whom obtains his infeftment confirmed, and the prior Creditor thereafter obtains his author and himself confirmed in the same deed, the posterior Creditor will be preferred*

CAMPBELL v. HENDERSON.

July 5, 1821.  
NARRATIVE.

JAMES BUCHANAN was infeft on a precept *a me*, but his infeftment was unconfirmed. He granted an heritable bond and

disposition in security to James Henderson, with a precept also *a me*, on which infeftment was taken in 1808. He afterwards granted another heritable bond in favour of the Miss Browns, with a precept also *a me*, on which infeftment was taken in 1811, and their infeftment was confirmed. Henderson thereafter procured a charter from the superior, confirming in the same deed the infeftment of Buchanan the common author, and also his own infeftment on the heritable bond granted by Buchanan.

CAMPBELL  
v.  
HENDERSON.  
1821.

An action of mails and duties was afterwards brought before the Sheriff, in which he preferred Henderson, "in respect of the priority of his heritable bond and infeftment." Campbell, the representative of the Miss Browns, advocated the Sheriff's judgment.

PLEADED FOR THE ADVOCATOR.—Between the date of the common author's infeftment and its confirmation, no mid-impediment intervened to prevent the application of the established maxim of law, that confirmation, whensoever obtained, imports to the right confirmed a constructive completion *ab origine*. Both creditors have the benefit of this supervening right of the author, but it must accresce in the first instance to the title first confirmed.

ARGUMENT FOR  
ADVOCATOR.

If the confirmation was sufficient to feudalize the common author's infeftment in any respect or for any purpose, it must be so in every respect and for all purposes. Its effect cannot be limited to the right of the party on whose application the superior granted the confirmation of the common author's titles.

PLEADED FOR THE RESPONDENT.—The confirmation of the second infeftment was originally inept. This original and essential defect could not be remedied by the subsequent completion of the common author's right. The maxim *jus superveniens* does not apply. That maxim is founded entirely on the obligation of warrandice incumbent on the granter of the null or defective deed. But the superior, by confirming the second infeftment, came under no obligation to confirm the title of the common author. Nor was there any supervening

ARGUMENT FOR  
RESPONDENT.

CAMPBELL  
v.  
HENDERSON.  
1821.

right acquired by the superior which could possibly accresce to the alleged vassal.

If indeed the confirmation of the common author's infeftment validated the infeftment of the creditor last infeft, the completion of that creditor's right cannot be considered as antecedent to the completion of the prior creditor's right. The confirmation of that right was granted *simul et semel* with the confirmation of the common author's confirmation. The first infeftment therefore must be preferred. The retrospective operation of confirmation is no impediment to this. The question is not whether confirmation of the common author's title validates the right of the creditor last infeft, but at what period that right was completed. Confirmation considered as the completion of the feudal real right has no effect prior to its actual date.

But, farther, the confirmation of the common author's title was obtained by the prior creditor in order to perfect his own right. The charter containing it bore expressly to be granted in his favour. It can therefore be available to the granter of the charter only, or those in his right, and it would be a violation of justice to hold that it can operate to the exclusion of the party who obtained it, and to the advantage of another who was no party to the transaction.

JUDGMENT,  
July 5, 1821.

LORD PITMILLY, Ordinary, " Advocated the cause, and preferred the advocator."

The respondent having reclaimed, the Court " Adhered."

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*The infeftment of an heir does not accresce to a right granted by his ancestor who died uninfeft.*

KEITH v. GRANT.

Nov. 14, 1702.  
NARRATIVE.

IN 1768 Sir Alexander Grant purchased from James Rose the barony of Clava, and certain lands in the neighbourhood of the town of Nairn. Sir Alexander was infeft in the barony on a Crown charter, but his right to the lands in the neighbourhood of the town of Nairn remained personal till his death. In 1778, his brother Sir Ludovick was served heir to him *cum beneficio*, and completed his title to these lands, by



obtaining a charter from the town of Nairn of such part of them as held feu, proceeding on the procuratory of resignation in the disposition from James Rose, and upon this charter he was infeft. He also obtained infeftment in the burgage lands, by executing James Rose's procuratory with regard to them, in the form used in burgage holdings. And in 1783, Sir Ludovick disposed the whole estates which he had taken up as heir *cum beneficio*, to Mr. William Keith, accountant in Edinburgh, as trustee for his brother's creditors.

KEITH  
v.  
GRANT.  
1792.

Mr. Colquhoun Grant was a creditor of his brother, in virtue of an heritable bond for £10,000, originally granted to Archibald Grant, Esq. of Pittencrieff. By this heritable bond Sir Alexander became bound for payment of £10,000 to the said Archibald Grant, and, in security thereof, he disposed to him an annualrent out of the lands and barony of Clava, and also out of the lands and others in and about the town of Nairn, acquired from James Rose, together with these lands themselves, in the common style of an heritable bond. The bond contained procuratory and precept, and Mr. Archibald Grant was infeft in all these lands, in virtue of the precept contained in the bond.

In 1787 Mr. Keith, as trustee for the creditors of Sir Alexander, sold the Nairn lands to David Davidson, who with his approbation, and in consequence of the minutes of the creditors, paid the price to Mr. Colquhoun Grant, in part payment of the heritable bond then vested in him. Mr. Keith having afterwards discovered that Sir Alexander had never been infeft in the Nairn lands, brought an action concluding that Mr. Davidson should be decerned to pay to him the price of the lands purchased by him, or that the representatives of Mr. Grant, who was then deceased, should be compelled to repeat the price of the Nairn lands.

**PLEADED FOR THE PURSUER.**—The infeftment of Mr. Grant in the Nairn lands is null, having flowed *a non habente*, Sir Alexander Grant, upon whose precept it was taken, never having been infeft. The original nullity of the infeftment is admitted, but it is contended that the original nullity was cured.

ARGUMENT FOR  
PURSUER.

There never was any *jus superveniens auctori*, for Sir Alexan-

KNITH  
T.  
GRANT.  
1792.

der never had the real right of the lands in his person, and so there was no real or feudal right in him that could accresce *successori*. As, too, Sir Alexander never had the feudal right of the lands in question in him, it is impossible that his brother Sir Ludovick can be considered as *eadem persona* with him *quoad* these lands; for, with respect to the real right, Sir Alexander was a stranger, and never was at all connected with the lands.

An heir is *eadem persona cum defuncto* only with respect to the right to the estate which was vested in the defunct, and to which the heir makes up complete legal titles. If a party deceased had two estates in him, the heir may be *eadem persona* as to one of these estates, and not as to the other. But if an estate was never at all in the deceased, an heir, however he may be heir in other rights, never can be *eadem persona quoad* that estate. Sir Alexander never had the property of the lands about Nairn, but was a mere creditor of James Rose for the property, who sold them to him; and though Sir Ludovick might be heir to Sir Alexander in the *jus crediti*, or personal right that was in him, he could not be heir to Sir Alexander in the feudal or real right, which never was in Sir Alexander. In that right Sir Ludovick was successor, not to Sir Alexander Grant, but to James Rose. He was a donee, not an heir; a singular, not an universal successor.

It is said, that wherever a person is bound in absolute warrandice, there the *jus superveniens accrescit*, but this does by no means hold so generally as it is stated on the other side. It is true, it may hold negatively, without any, or with very few exceptions, that where a person is not bound in absolute warrandice, *jus superveniens non accrescit*; but it will not hold on the other hand, positively, that wherever a person is bound in warrandice, there the *jus superveniens* does accresce. This will easily appear, by putting one very simple case. Suppose A disposes lands to B, who is infeft upon A's precept, and C becomes bound in warrandice. C afterwards acquires a good right to the lands, and it appears that A never had any right: C here is bound in warrandice to B, but the *jus superveniens* to C will not *ipso jure* accresce to B.

An obligation to convey is implied in the warrandice, and the law holds an obligation to convey and conveyance as the

same in personal rights. And so in the case just now put of A, B, and C, if the conveyance had been a mere assignation to a debt, the *jus superveniens* to C might have accresced to B.

The case, however, is different where forms and solemnities are requisite, such as sasine given to the successor by the author, which is indispensably requisite in order to convey a real right in lands from the one to the other, the rule being invariable *Nulla sasina nulla terra*. The maxim *jus superveniens*, &c., has been extended to the case of infeftments, but only when the *jus supervenit ipsi auctori*, upon whose precept or procuratory the successor's sasine was obtained, because it is then only that there are *termini habiles* for it. There can be no sasine but what is given by a person having the feudal right in the lands; but when a person, who is not *in titulo* at the time, gives infeftment to another, and that same person afterwards is vested with a good feudal right, the *jus superveniens* does indeed accresce, so as to validate the infeftment of the successor. The reason is, that all the necessary solemnities concur, there being sasine given by the feudal proprietor himself; and though he has given it a little beforehand, still he has given it in all due form; and when he himself afterwards acquires the complete right, it cannot be necessary to repeat what he has already done.

But when the infeftment flows from a person who neither then has, nor thereafter acquires, the feudal right, there is a total and essential defect in point of solemnity, which never can be cured, nor the defect supplied by any right supervening in the person of another. The reason is, that sasine can only flow from a person who is himself infeft; and sasine upon the precept of a person who never has been infeft is no sasine at all, and never can by any means be made a good infeftment.

If the heir of the granter afterwards acquires right to the lands, he may be bound perhaps to grant infeftment flowing from himself, and if there is no mid-impediment he may do so; but a null sasine given by one who never had right to the lands cannot possibly become valid, merely because another, who has right to these lands, is bound, or afterwards becomes bound, to grant infeftment.

Sir Ludovick Grant was not the heir of Sir Alexander Grant

KNITH  
F.  
GRANT.  
1792.

KEITH  
v.  
GRANT.  
1792;

in these lands. *Quoad* them, therefore, he was not *eadem persona* with Sir Alexander. The one was a stranger to the lands, and the other was the feudal proprietor of them, as singular successor to James Rose; and consequently it never can be said that the sasine in question was given by the same person, who came afterwards to be infeft in the lands.

Sir Alexander Grant lived and died as much unconnected with these lands, *quoad* the feudal right, as any third party whatever. He never can appear in the series of feudal proprietors. He neither succeeds nor is succeeded to. He was not successor to one, nor could be author to another; and the feudal rights acquired afterwards by his heir can no more accresce to validate a sasine granted by him, which is a mere nullity, than in the case formerly put, the right acquired by C, the guarantee, could accresce to validate the sasine taken upon the precept of A, who had no right. Or, to put another case, suppose a stranger quite unconnected with the lands grants a precept, upon which infeftment is taken, and the proprietor afterwards obliges himself to warrant the infeftment, or to hold it as valid, there cannot be a doubt that the infeftment would still remain absolutely void and null; and the same would be the case though the proprietor should afterwards become the general disponee, the heir of provision, or the heir-at-law of the granter of the precept.

ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—The rule that *jus superveniens auctori accrescit successori*, is admitted in the laws of all countries. It is to enforce this principle of natural law that the law of Scotland *fictione juris* holds the subsequent acquisition of the right, by a person liable in warrandice, to have preceded the granting of the right which is warranted. This principle applies to rights of all kinds, heritable as well as moveable, real as well as personal. With regard to all of them, however, it is necessary, *first*, that the right to be validated shall be complete *suo genere*, so that if it had flowed *a vero domino* it would have been liable to no objection; and *second*, that the right supervening to the party liable in warrandice shall also be unexceptionable.

In the case of land-rights, there must be, *first*, such a con-

KEITH  
v.  
GRANT.  
1792.

veyance and sasine, as, if they had been obtained from the true owner, would have been unexceptionable ; and *second*, a feudal right, equally unexceptionable, in the party liable in the warrandice. Where these two circumstances are united, justice requires that the maxim of *jus superveniens* should be admitted ; and there is nothing in the nature of the right, or in the particular law of Scotland, to prevent it.

The question, therefore, in every case of this kind, is, *first*, Whether the heir is liable in warrandice ? and *second*, Whether at any time before the competition he had become proprietor of the subject to which the warrandice applies ?

If, instead of taking infestment in his own person, Sir Alexander Grant had conveyed his right in the Nairn lands to a trustee who had been infest, could it be maintained that the rule of *jus superveniens* would not be applicable ; because in that case, as well as in the present, it was not *ipse auctor*, but another person coming in his place, in whom the right became complete ? If, again, Sir Alexander had died before his trustee took infestment, it is surely impossible to maintain that in such a case the benefit of the trustee's infestment would not accrue to any heritable creditor of Sir Alexander Grant's, who had been previously infest in these lands.

Where, then, can the doubt exist in the present case ? A trustee is merely the representative of his constituent in a particular subject, and yet he, or rather the estate in which he is infest, is subject to the operation of the *jus superveniens*, because he comes precisely in the place of the person who was bound in the warrandice. Shall it then be said that an heir who, in the contemplation of law, is *eadem persona* with the ancestor, who, in consequence of his service, is liable universally, and who, by the express terms of the clause of warrandice, is, in this case, bound to support and give effect to the right disposed by his predecessor, is to be in a different situation ?

It has been said, that an infestment derived from a person who never was infest is null and void ; that the rule with regard to land-rights is, that *Ubi nulla sasina, ibi nulla terra* ; that of course the infestment in question never could be considered valid ; and that the maxim of *jus superveniens* is inapplicable to the case of land-rights where the party granting

KEITH  
v.  
GRANT.  
1792.

infestment never was infest ; because in feudal conveyances it is necessary to decide according to strict form, without any relaxation on account of equitable principles.

This reasoning, however, is more specious than solid. It confounds two things which are quite distinct from each other, a sasine which is intrinsically void and null, and a sasine which is only liable to a temporary objection. In the one case the maxim of *jus superveniens* cannot be applied, because there is, in fact, no right which can be the subject of it. The law, however, is very different with regard to those rights which are not absolutely void, but which depend for their complete efficacy upon certain events which may afterwards happen ; and this is the situation of rights derived from those who are not in the full property of the subjects conveyed, these being originally liable to challenge, but at the same time capable of being rendered complete by the subsequent acquisition of the property in him who is liable in the warrandice. As to the reason given, why the maxim of *jus superveniens* should not take place in the case of a land estate, where the right flowed from the ancestor, while no infestment followed in his person, viz., that this is a matter of strict form ; by proving too much, it proves nothing at all. In this way, the brocard of *jus superveniens* would never operate in feudal rights, a proposition which cannot at this time of day be seriously maintained. In this case, as well as in many others, it has been found possible to do justice, without infringing any established form. In order to make way for the *jus superveniens* in feudal rights, it is required that there shall be, *first*, a sasine completed in the regular manner in the person warranted ; and *second*, another sasine equally formal in the person liable in the warrandice. When these two circumstances are united, expediency as well as justice require that full effect be given to the acts and deeds of the parties.

JUDGMENT.  
Nov. 14, 1792.

The Court Found, " That Archibald Grant of Pittencrieff's heritable security was only effectual as to the barony of Clava, but not as to the Nairn lands ; and therefore that his representatives, in so far as they have received payment of more than the purchase-money of said barony, must repeat the same to the trustee for the creditors of the common debtor."

In the Faculty Collection it is stated to have been observed on the Bench as follows :—" The *jus superveniens* cannot accresce in the present case. If an author after giving infeftment is himself vested in the feudal right, his title becomes complete both in form and in substance, and this new acquisition of right is communicated to all his former deeds. But a sasine obtained *a non habente* is altogether inept, and cannot be cured by any supervening right in his heir. In personal rights the law holds an obligation to convey and a conveyance to be the same ; and, therefore, every person liable in absolute warrandice is bound to grant the conveyance. But in heritage, although an heir whose ancestor conveyed having only a personal right is liable in warrandice, and is obliged to give an infeftment, still that infeftment cannot proceed on the precept granted by the ancestor, who never acquired any right which entitled him to grant that warrant. The circumstance of Sir Ludovick having entered heir *cum beneficio*, does not in the least affect the case."

KEITH  
v.  
GRANT.  
1792.  
OPINIONS.

1. A conveyance granted by a party who has no right to the subject conveyed, but with consent of the true owner, is effectual. See vol. I. p. 33. In the case of *BUCHAN v. COCKBURN*, July 14, 1739, there given, LORD KILKERRAN states,—“ All agreed that a proprietor of land consenting to a disposition granted *a non domino*, implies a conveyance by the *dominus*.” There is no case, however, in which the point has occurred of a party who had no right conveying, and afterwards acquiring a right. In such a case would the maxim *jus superveniens auctori accrescit successori* apply ? It is not doubted that the granter of the conveyance would be under an obligation to grant a new conveyance of the subject ; but would the acquired right of

the granter accresce to the grantee *ipso jure* ?

2. Professor Bell in his Principles observes,—“ If the granter of the precept have at the time no right to the subject, but acquire a right by a subsequent title, it may be doubted whether accretion will take place. The ground of this doubt is, that there can be no proper conveyance where there is no right existing : that law may *fictione* supply solemnities but not substantial right ; and that in such cases there is nothing but an implied obligation to convey which requires a different mode of completion.” Mr. Bell adds in a Note :—“ In consultation with the late Mr. Jameson we differed in opinion ; that sound lawyer inclined to hold the maxim applicable.”—*Bell's Principles*, § 882.

## PRESCRIPTION.

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*A Feudal right of property cannot be lost by the Negative Prescription.*

### PRESBYTERY OF PERTH v. MAGISTRATES OF PERTH.

**March 6, 1730.** IN 1569 James VI., with consent of the Earl of Murray, then Regent, by a gift and charter under the Great Seal, granted for the use of the poor, within the burgh of Perth, all lands and tenements which belonged to the Dominican Friars, the Friars Minor or Franciscan, and the White Friars of that burgh, together with the yards, monastery, or charter-house, belonging to the said Friars. By the charter, the rents and yearly income of the said lands were appointed to be received by a collector or hospital-master or masters, to be annually chosen by the ministers and elders of the Kirk-Session of the burgh of Perth, who were to apply the same to the poor uses mentioned in the charter, and to no other. Infeftment followed upon this charter, and in 1587 the same sovereign confirmed the charter, and both charters were afterwards ratified by Parliament.

**NARRATIVE.**

The rents and income of the Hospital lands were rightly applied till about the year 1643, when the Magistrates and Town Council of Perth, having obtained a share in the management of the lands, applied the income to the use of the town of Perth, and refused to be accountable to the Presbytery of Perth, who had the inspection of poor donations within the bounds.

An action was then raised by the Presbytery of Perth, concluding to have the Magistrates compelled to produce their



title to the Hospital lands, if they any had, and to have the same reduced, and also to have it declared that the pursuers had the only undoubted right and title to these lands, in virtue of the royal charter, and infeftment thereon, and the ratification by Parliament.

PRESBYTERY  
OF PERTH  
c.  
MAGISTRATES  
OF PERTH.  
1780.

The Kirk-Session having disclaimed the action at the pursuers' instance, the defenders pleaded that the pursuers had no right to insist in the name of the Kirk-Session. The Court Found, "That the Ministers and Elders of Perth cannot disclaim the process, and sustained process at the Presbytery's instance, in order to exclude any interest the Magistrates of Perth can pretend to the Hospital lands, and remitted to the Ordinary to proceed accordingly." July 12, 1728.

The cause having gone back to the Lord Ordinary, the defenders pleaded the negative prescription.

PLEADED FOR THE PURSUERS.—The defenders never had any title to the lands in question, and the pursuers having produced a title to them, their right under it could never prescribe unless excluded by another title and possession thereon for forty years. ARGUMENT FOR PURSUERS.

The Act 1617, cap. 12, consists of two parts. The *first* part establishes the positive prescription, by which proprietors of lands who have been in possession, by virtue of heritable infeftment for forty years together, without any lawful interruption, and their heirs and successors, shall not be disquieted in the heritable right and property of their lands. The *second* part of the Act establishes the negative prescription, by which it is provided that all action for charging lands, and for recovering lands upon covenants and obligations, shall prescribe if not insisted in for forty years. It relates to actions on heritable bonds, reversions, &c., and is confined to such deeds as are not, properly speaking, rights of property, but such as create a burden on the estate. This part of the Act, however, in no way establishes a right to lands by a possession for forty years without any title. This would be in direct contradiction to the first part of the Act.

A right of property in land cannot be lost by the negative prescription, unless another party has acquired right by the

PROVOSTRY  
OF PERTH  
AND  
MAGISTRATES  
OF PERTH.  
1780.

positive prescription. When a complete right of property is once established, that right must remain for ever, unless it is transferred from the party in whom the right was established, by conveyances, legal or conventional, or unless the property is, without such conveyances, acquired by the positive prescription. The defenders have produced no title. *POSSIDEO QUIA POSSIDEO* is no defence to a declarator of property proceeding upon an *ex facie* valid title. A mere possessor has no right to object the negative prescription. The property of all the land in Scotland must be somewhere. If a former proprietor has lost it *non utendo*, what has become of it? The party possessing cannot have got it, because there can be no property of land without investiture. Without an investiture no fee can be constituted. There can be no superior nor vassal, and consequently if there be no investiture of the lands, the property must be caduciary and belong to the King. Where there is a subsisting right of property, that cannot be taken away except by reduction. The right to reduce may prescribe *non utendo*, but a right of property itself cannot prescribe where no other party has acquired by prescription. The law never intended to secure a mere *PRÆDO* by cutting off the rights of other parties. The whole question at issue, therefore, resolves into this,—whether one who has no right to lands can object the negative prescription, against a party who for certain had once a complete right of property? The pursuers submit that he cannot.

ARGUMENT FOR  
DEFENDERS.

PLEADED FOR THE DEFENDERS.—The plea of the defenders is not that they have right by the positive prescription. They are not bound to say so in the present state of the case. If their right were of yesterday it would be good against the pursuers, if theirs is prescribed. The defenders, therefore, are not bound to say what their right is, if the title of the pursuers be extinguished by the negative prescription. This plea is established by the express words of the Act 1617. The latter part of that Act ordains that all actions competent upon heritable bonds, reversions, contracts, or others whatsoever, shall be pursued within the space of forty years after the date of the same, otherwise to prescribe. From this it is evident that the negative prescription is as firmly established as the positive, and is indeed the

chiefest security intended for quieting the minds of the lieges. The preamble of the Act is, that writs are often lost by injury of time. What is the consequence of that, but that those who may have lost their evidents, and so cannot have the benefit of a positive prescription, may be quiet in the possession, if no action be moved against them for forty years, and in that case are not bound to produce any titles, or open their charter-chests to one whose right is prescribed *non utendo*.

PRESBYTERY  
OF PERTH  
P.  
MAGISTRATES  
OF PERTH.  
1780.

It is impossible for the pursuers to contend that an action, the object of which is to take away from the defenders lands which they have possessed for forty years, does not fall under the Act of Parliament, nor to plead that a right of property does not prescribe *non utendo*. It is against these very rights that prescription is principally introduced.

The pursuers have objected that the defenders have produced no title. That is true. They are not bound to do so, because their very defence is, that they are not obliged to produce any, and that they wont open their charter-chest to any one whose right is prescribed, until he remove that objection by establishing interruption.

The Lord Ordinary "Repelled the allegiance of negative pre- July 25, 1728.  
scription, in respect of the answer that the defenders had produced no title, and Found that the lands, and all others libelled, do pertain and belong to the Hospital of Perth; and decerned and declared accordingly."

The defenders having reclaimed, the Court "Adhered." Nov. 21, 1728.

A second petition was presented by the defenders, praying the Court to find that, as being called as defenders, or as being in possession, they had a right to object the negative prescription against the pursuer's title, which was *ex facie* prescribed *non utendo*, and that the defenders were not obliged to produce any title, and much less to allege positive prescription.

On considering this petition with answers, the Court again Dec. 25, 1728.  
"Adhered."

The defenders having appealed to the House of Lords, "It House of Lords,  
was Ordered and Adjudget that the interlocutors complained March 6, 1780.  
of be affirmed."

## II.—MACDONELL v. DUKE OF GORDON.

Feb. 26, 1828.

## NARRATIVE.

In 1602 James VI. granted a charter to Alexander Campbell of Ardchattan, conveying to him, *inter alia*, the monastery and priory of Ardchattan, and also the patronage of the church of Kilmanivaig, and infeftment followed on the charter in 1606. The right of patronage was afterwards conveyed by John Campbell of Ardchattan to Macdonell of Glengarry.

In 1618 James VI. granted to Lord George Gordon a charter of the lands of Inverlochie, comprehending the patronage of the church of Kilmanivaig, and on this charter infeftment was taken in 1623.

In 1822 a competition arose for the right of presentation between the pursuer, as holding right from Campbell of Ardchattan, and the defender. Mutual actions of declarator were brought, the one at the instance of Macdonell, with concurrence of Campbell of Ardchattan, against the Duke, and the other by the Duke against these parties.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—The title of Campbell of Ardchattan to the patronage in question is clearly preferable to that of the Duke of Gordon, the former being dated in 1602, and the latter in 1618, unless the Duke can establish a prescriptive right. The right of the former cannot be excluded by the negative prescription. Such a plea is unfounded in regard to a right of feudal property. Such a right cannot be lost by negligence. It can only be lost by another party acquiring it in virtue of the positive prescription. The rule of law is, that a right of property must be transferred by a title. Were it otherwise, a party who had no title might plead that his opponent had lost the right which had been vested in him by an undoubted written title. If such a doctrine were sustained the positive prescription would be utterly useless, and the negative prescription, instead of being a mode of extinguishing a right, would be a mode of acquiring one.

ARGUMENT FOR  
DEFENDERS.

PLEADED FOR THE DEFENDERS.—The negative prescription is applicable to a right of property. This has been settled by

various decisions, and particularly by the case of *Paul v. Reid*; and accordingly it has been repeatedly found that rights of servitude may be so lost.

MACDONELL  
v.  
DUKE OF  
GORDON.  
1828.

The Court “ Found that the negative prescription did not apply to a right of property in a feudal subject.”

JUDGMENT.  
Feb. 26, 1828.

LORD JUSTICE-CLERK BOYLE observed,—“ I am decidedly of opinion that the negative prescription does not apply in this case, and that the Duke of Gordon cannot avail himself of that plea unless his own titles are fortified by the positive prescription.”

OPINIONS.

LORD CRINGLETIE.—“ As to the negative prescription, I perfectly agree with the Lord Justice-Clerk.”

LORD COREHOUSE.—“ I think it clear that Glengarry has not lost his right by the negative prescription. If there be a principle well settled in the law of Scotland, it is this—that the right of ownership in a feudal subject, being complete, cannot suffer the negative prescription. That principle has been sanctioned by the practice of two centuries, and to shake it would be attended with incalculable mischief. There is not the trace of an authority or decision that a title to land, radically defective in its constitution, and followed by a possession short of forty years, is preferable to a title radically good, but upon which no possession has followed. The reason is manifest. Possession has certain effects, and indeed very important ones, in proper possessory questions—in questions with regard to the right of detention, interdict, consumption of fruits; but, in declaratory cases as to the constitution of land-rights, possession for less than forty years is equivalent to no possession at all. If A has a grant, and no possession, and B has a grant, and thirty years’ possession—in a declarator A and B must compete solely on the validity of their respective grants. In this case, Ardchattan’s grant from the Crown was clearly prior and preferable.

“ Not one of the authorities cited by the Duke of Gordon touches this principle. He refers to servitudes, adjudications, and other encumbrances; and it is true these may be lost, because the rule applies only to the right of *plenum dominium*,

MACDONELL  
v.  
DUKE OF  
GORDON.  
1828.

complete ownership, as contradistinguished from such burdens. So also the right of reducing a grant on any extrinsic nullity may be lost, as Mr. Erskine has distinctly explained. Of this last description was the case of *Clarke v. the Earl of Home*, on which the Duke relies. For a full exposition of the law on the question of the negative prescription, I would refer your Lordships to another and a recent case, which I am surprised the Duke of Gordon has quoted—I mean that of *Paul v. Reid*, being in direct opposition to his argument. It was there distinctly admitted that in no case could the right of ownership in a feudal subject be lost by the negative prescription. But I shall not detain your Lordships on a point which I consider so perfectly clear.”

LORD ALLOWAY.—“ I am most happy to concur with your Lordships with regard to one question which is of the utmost importance where the negative prescription was endeavoured to be pleaded for the purpose of making a complete feudal right.”

LORD PRESIDENT HOPE.—“ With regard to the negative prescription, my opinion is quite as clear as to the positive prescription. We are told that it is admitted that the negative prescription applies to all rights of action, but not to rights of property. Now I should like to know, when I am in possession of a feudal subject by a title, how any one can get me out of possession but by an action. Let him have the best possible title in the world, how can he turn me out but by an action? What I take to be the meaning of the law, and the passage in Erskine, is this—that the negative prescription cannot be pleaded, except by a person who has in him such a title as would be good, if the positive prescription had run. Take the case which I put of a person being in possession upon a charter and sasine; he is entitled to plead the negative prescription, although the positive has not run in his favour, because his possession was on a title to which the positive prescription would apply. That was the case in *Paul v. Reid*; and most sincerely do I regret we are deprived, by indisposition, of the assistance of one of our brethren, (Lord Eldin,) who, in that case, in one of the ablest speeches I ever heard from the bar, probed the law of prescription to the bottom, and convinced the Court that the negative prescription might be pleaded by a

party who had in him such a title as would have been good, if the positive prescription had run. But suppose I am in possession under a tack, I could not plead the negative prescription against the person who claims the property, because my title to the property never could have been made good by the positive prescription. In the same way, in a right which is redeemable *in gremio*, I cannot plead that against the real proprietor, because no length of possession would have made it good as a right of property. But if we are right as to the positive prescription, that is of less consequence. I confess that on the question of positive prescription I have no doubt."

MACDONELL  
v.  
DUKE OF  
GORDON.  
1828.

LORD MACKENZIE.—"With regard to the negative prescription, I was counsel in the case of Paul and Reid with Lord Eldin, and I never understood that we maintained that a right of property could be extinguished by the negative prescription. I have only to add on that subject, that if the negative prescription could have such an effect, it seems demonstrable that there would be no room for the positive prescription, because in every case the negative prescription must be the stronger of the two. But there are cases of constant and almost daily occurrence, in which a party who has failed to make his title effectual by the positive prescription, is not, and cannot be, allowed to disturb the right of his adversary by pleading the negative prescription. Suppose a party is in the course of prescribing his title both by the positive and negative prescription, when his possession is interrupted by being challenged by a stranger; and then suppose a question occurs afterwards with a third party, would he be entitled to plead the negative prescription as against that third party, so as to set aside the previous interruption which had been given to his possession? Such a plea would not be available, but the previous challenge would be held, even against such third party, as an interruption to the positive prescription. Your Lordship may recollect more distinctly the case of Reid, and I may be mistaken; but I think it right to state what my recollection of that case was, in which I wrote the papers, and was along with Lord Eldin."

LORD NEWTON.—"It does not appear to me that the negative prescription applies in this case."

*An unrecorded Sasine is not a sufficient Title for Prescription.*

CRAWFORD v. M'MICHEN.

Jan. 4, 1729.

This case is given in Volume II. page 112.

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*Extrinsic Objections to a Title are lost by the Negative Prescription.*

I.—PAUL v. REID.

Feb. 8, 1814.

This case is given in Volume I. page 182.

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II.—EARL OF DUNDONALD v. BOYES' TRUSTEES.

May 12, 1886.

NARRATIVE.

In 1770 Captain Gilchrist executed a settlement conveying his lands to his wife in trust, with directions to convey them to his two daughters, Grizel and Ann, equally, as soon as the youngest should attain twenty-one years. In 1778 the eldest daughter, then Mrs. Boyes, obtained a precept of *clare constat*, as eldest daughter, and one of the two heirs-portioners of her father, and on the precept she was infeft in one just and equal half of the lands. In 1779 she and her younger sister, who had married the Earl of Dundonald, entered into a submission for the purpose of ascertaining the extent of the *precipuum* due to Mrs. Boyes, as the eldest heir-portioner, and in the following year decree was pronounced by the arbiter assigning certain subjects to her as a *precipuum*.

In 1786 a brieve was taken out by Mrs. Boyes and her husband for dividing the lands, and in her claim she claimed the half lying contiguous to her *precipuum*. Her sister, Lady Dundonald, was now deceased, but the claim was taken out by the agent for her children, who stated no objection to it, and



agreed to have it remitted to an inquest. The process, however, fell asleep, and was not finally insisted in until a wakening and transference of it was brought in 1828 by the trustees of John Boyes, junior, the son of the elder sister. In 1830 the lands were divided by the Sheriff and a Jury—the *precipuum* designated in the decree-arbitral being excepted from the division, and the half of the land which was contiguous to the *precipuum* was given to the trustees of Mr. Boyes. The Earl of Dundonald, the son and representative of the younger sister, then obtained a precept of *clare constat* from the superior, and was infest under it.

EARL OF  
DUNDONALD  
v.  
BOYES'  
TRUSTEES.  
—  
1836.

In 1833 the Earl expedite a general service as heir-portioner of provision under the settlement of his grandfather in 1770, and brought a reduction of the submission entered into between his mother and her sister in 1779, and also the decree-arbitral of 1780, and also the decree of division in 1830. The action also concluded for declarator, that under the settlement of 1770 the elder sister, Mrs. Boyes, had no right to a *precipuum*, and that the pursuer had right to one half of the heritage which had been allotted to her as a *precipuum*.

PLEADED FOR THE DEFENDER.—The right of Mrs. Boyes to a *precipuum* was fortified both by the positive and negative prescription. ARGUMENT FOR  
DEFENDER.

By the submission in 1779 her right to a *precipuum* was expressly admitted, and by the decree-arbitral in 1780 the precise extent of it was decided. If this decree could not be challenged, the pursuer was excluded from impeaching the right of Mrs. Boyes to the *precipuum*. But all right to challenge that decree was cut off by the negative prescription, as four years had run, after the decree, before the death of Lady Dundonald, and above thirty-seven years of the majority of the pursuer, Lord Dundonald, had run before the institution of this action. It was quite competent to the defenders to state this plea, whether they could also plead the positive prescription or not; because the effect of the plea, in this instance, was to cut off the pursuer's right to attack their title. But the positive prescription had also run in favour of the defenders. Mrs. Boyes was infest, as eldest heir-portioner, in 1778, and this

EARL OF  
DUNDONALD  
v.  
BOYES'  
TRUSTEES.  
1836.

infestment was followed with more than forty years' possession. As to the *precipuum* lands, it was true that the natural possession of Mrs. Boyes commenced as late as 1803, but that was because the liferentrix lived till then, and her possession was the possession of the fiar. The infestment of Mrs. Boyes, to its full legal extent, was therefore unchallengeable; and even if it were only in the *pro indiviso* half of the lands in general, it was necessarily an infestment in the full right of the *precipuum* lands, as they were an indivisible subject, to which a younger heir-portioner was legally a stranger. The right of Mrs. Boyes in the *precipuum* lands was therefore complete, without any brieve or division, or conveyance from the other heir-portioner; and if these were necessary, *quoad ultra*, the defenders could compel the pursuers to concur in such measures, so far as not already carried through.

ARGUMENT FOR  
THE PURSUERS.

PLEADED FOR THE PURSUERS.—The pursuers stood infest as heir of provision under the settlement of 1770, which cut off all right of *precipuum* on the part of Mrs. Boyes.

Neither the positive nor the negative prescription were applicable to the present claim. The negative prescription could not be effectual to take away any right of property in the *precipuum* lands which arose under the settlement of 1770. But farther, the negative prescription could not competently be pleaded by any party whose title was not fortified by the positive.

The positive prescription was also inapplicable. The infestment of Mrs. Boyes in 1778, was expressly limited to her "just and equal half" of the lands of Annsfield, with houses, &c., as well as of all the other lands. It did not refer to any *precipuum*; and it was not repugnant to the settlement 1770, which also gave the same *pro indiviso* half of every heritable subject, including Annsfield. There was no other infestment to which the positive prescription could be referred; and no length of possession, following on an infestment which was thus limited, could enlarge the party's right beyond the *pro indiviso* half in any part or portion of the subjects. As to the possession of the *precipuum* lands by Mrs. Gilchrist, as liferenter under the bond and disposition of 1777, executed in her favour by

Captain Gilchrist, it could not impute as the possession of any  
fiar, especially where the fiar's title was not made up conform-  
ably to Captain Gilchrist's settlement.

KARL OF  
DUNDONALD  
v.  
BOYES'  
TRUSTEES.

1836.

LORD COCKBURN reported the cause on cases, and the Court  
"Sustained the plea of the negative prescription."

JUDGMENT.  
May 12, 1836.

LORD BALGRAY.—"I think the defence of prescription must  
be sustained."

OPINIONS.

LORD PRESIDENT HOPE.—"I am of the same opinion. I  
think the plea of the defenders is good both on the positive  
and the negative prescriptions. The negative is quite enough  
for their defence, and consistently with the case of *Paul v.*  
*Reid*, which received great consideration, I hold the defenders  
perfectly entitled to state that plea, even if they could not also  
plead the positive prescription. It has been frequently said  
that no man can plead the negative prescription, as affecting  
an heritable right, who cannot also plead the positive. But  
this is too loose; and the correct statement of the doctrine  
appears to be, that the negative prescription can be pleaded by  
any party to whom the positive prescription, if it had run,  
would have afforded a good title. Such a party, I conceive,  
may plead the negative prescription, whether the full term of  
the positive prescription has run in his favour or not."

LORD MACKENZIE.—"I concur with your Lordship in holding  
the defenders entitled to plead the negative prescription; and  
that plea is sufficient for their defence. Their argument on the  
submission and decree-arbitral appears to me to be invincible.  
The terms of that submission distinctly implied an acknowledg-  
ment that Mrs. Boyes had right to a *precipuum*. They admit  
of no other construction. If the submission had been entered  
into yesterday, and was not impeachable on the ground of  
fraud, or any other relevant ground, there would be an end of  
the pursuer's case, in so far as that deed would import a dis-  
tinct acknowledgment that Mrs. Boyes had right to a *precipuum*.  
The decree-arbitral defined the extent of the *precipuum* in 1780.  
Now, it appears to me that the decree has been fortified by the  
negative prescription, and that the right to challenge it is cut  
off. According to the decision of *Paul v. Reid*, the negative

EARL OF  
DUNDONALD  
v.  
BOYES'  
TRUSTEES.  
1886.

prescription excludes reduction. But, without a reduction of the decree-arbitral, the pursuer cannot effectually insist. And as this is not now competent to him, it appears to me that his case is at an end, in consequence of the application of the negative prescription in support of the defences.

"It is unnecessary for me, therefore, to give judgment on the plea founded on the positive prescription. I am not prepared to say whether that plea is well-founded. I am not satisfied that the *jus crediti* under the disposition of Captain Gilchrist would have been extinguished, but for the decree-arbitral and the negative prescription. The service as heir-portioner, followed by the vague sasine, and by prescription, would probably have been a good title; but I do not see such possession here as would have supported the positive prescription; and, in particular, I am not prepared to assent to the plea that, in this case, the possession of the liferentrix was equal to the possession of the defenders' author. On the whole, I should not have been free from doubt had not the negative prescription applied; but that is decisive of itself."

LORD GILLIES.—"I agree. The pursuers plead that Mrs. Boyes made up her title to one half of the lands, which was exactly what she would have taken if she had acted under the settlement 1770. But still she did make up her title expressly as eldest heir-portioner, and in that character alone. I think the defences should be sustained."

### III.—CUBBISON v. HYSLOP.

Nov. 29, 1837.

NARRATIVE.

In 1765 John Cubbison conveyed his lands to his second son John, the deed bearing *in gremio* to be granted in security and relief of certain debts which had been undertaken by John, and in security also of a provision in his favour, and on this conveyance John was infeft. In 1766 the father died, and, in 1769, the eldest son David having paid the debts, and the provision in security of which the disposition to his brother had been granted, John granted a conveyance of the lands to David, who died without being infeft.

Shortly before his death he granted an heritable bond over the lands to William Aird, who, in 1773, obtained a decree of constitution against his son William, then a minor, and charged him to enter heir in special to his father and grandfather. Aird then raised a process of adjudication, and in 1774, he obtained a decree in absence. A ranking and sale of the lands having been afterwards brought, decree of sale in 1787 was pronounced in favour of Aird, who afterwards conveyed the lands to the defender, and, in 1791, the defender obtained a charter of sale from the superior, and was infeft under it in 1803.

CUBBISON  
v.  
HYELOP.  
1837.

John Cubbison, to whom the conveyance of 1765 had been granted, died in 1817. After his death Margaret Cubbison, the sole surviving child of his brother David, expedie a general service as heir to her uncle, and, in 1832, brought an action of reduction against the defender, seeking to have reduced the decree of adjudication obtained by Aird in 1774, the decree of sale in his favour of 1787, the conveyance by him to the defender, and the feudal title made up by the defender.

PLEADED FOR THE DEFENDER.—The pursuer's right to prosecute the present action is excluded by the negative prescription. Although the negative prescription cannot extinguish an infeftment it may be effectually pleaded against a right of action, and it cuts off all real as well as all personal actions. It is no bar against pleading the negative prescription that a party cannot also plead the positive.

ARGUMENT FOR  
DEFENDER.

In the present instance, the defender is in possession of the lands under a complete feudal right, clothed with infeftment. In order to cut that right down, the pursuer has raised a reduction, *inter alia*, of the decree of sale, without which she could not succeed in voiding the defender's right. But this action, and all the pleas urged in support of it, are cut off by the negative prescription. The procedure in that action of sale was *ex facie* regular, and *in foro*. And as to the pleas alleged, that William was a minor, and abroad, and had granted no authority to any party to appear for him; that the estate had been sold for debts, some of which were those of third parties; that the proven value was under-estimated; and the estate was

CUBBISON  
v.  
HYSLOP.  
1887.

not bankrupt, &c.,—these are, each and all, cut off by the negative prescription. The decree of sale is therefore unchallengeable ; and as the pursuer cannot shake the defender's feudal right, without setting it aside, the defender must be assoilzied.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—The present action is a proper competition of rights to land. The question at issue is, which party has the best feudal title ?

The pursuer has connected herself, by service, with John (2), who was infeft under a disposition from John (1). The right of the defender was not clothed with infeftment till 1803, so that the positive prescription has not run in his favour ; and no course of negative prescription, however long, can extinguish the infeftment of John (2), or prevent the pursuer, who connected herself with that infeftment, from prevailing in the competition, unless the defender is able to instruct a preferable right, independently of all aid from the negative prescription.

The competing right of the defender rests on his decree of sale in 1787, and his adjudication in 1774 ; but both of these decrees were irregular and inept. The decree of adjudication was inept, because it followed on a charge to William Cubbison, to enter heir in special to his father David, and his grandfather, as last infeft in the lands of Banks ; whereas David had never been infeft, and his grandfather was divested by the disposition and infeftment in favour of John. It was also inept as being led in absence against a minor ; and as being led for a larger sum of debt than was due. Again, the decree of sale was invalid, because the title of Aird, who pursued the sale, rested on the adjudication which was inept ; and the action was directed against William Cubbison, who had no right or title to the lands, the full right thereto being still vested in John (2), who was then alive, and who was not made a party to the process. Further, William Cubbison was then a minor, and was abroad, and had granted no mandate to any party to appear for him, so that the whole proceeding, as against him, was irregular, any appearance made in his name being without a warrant. The debts, too, for which the lands were sold were, in great part, the debts of third parties, for which the estate

could not be made liable ;—and even assuming the debts to have been correctly stated, the estimated value of the lands, as the proven value, was greatly below their true worth, and the estate was not bankrupt. If the decree of adjudication and decree of sale were thus inept, the right conveyed by Aird to the defender, which was entirely founded thereon ; and the title under the charter of sale made up by the defender, must fall to the ground.

CUBBISON  
v.  
HYSLOP.  
1887.

LORD COCKBURN, Ordinary, sustained the defences, and assolizied the defender.

The pursuer having reclaimed, the Court “ Adhered.”

JUDGMENT.  
Nov. 29, 1837.

LORD MACKENZIE.—“ I am satisfied that the challenge of the decree of sale is cut off by the negative prescription. It is true, the pursuer has pleaded that even if the decret be unchallengeable, still she connects herself with a preferable real right, and must prevail in competition with the defender. If that were correct, I am not sure that she could be prevented by the force of the negative prescription from establishing such right, and carrying off the land. It would at least be a different case from that of Paul v. Reid ; but I do not think that any such case presents itself here. This process is just a reduction of the decree of sale, and the negative prescription effectually protects the decree from challenge.

“ But besides this, the disposition by John Cubbison (1) to John Cubbison (2) was granted not in property, but merely in security of debt. The debt was paid, and consequently the right in security fell. In addition to this, John (2) granted a re-disposition to David Cubbison, the pursuer’s father. Perhaps that deed was not necessary to effect the complete divestiture of John (2), but if it was necessary, it was granted, and it conferred a *jus crediti* on David, independently of any infestment following on it. And that would be quite enough to sustain a decret of sale, taken against David or his representatives. It is out of the question to allow any party to say that by his delaying to take infestment on the deed, the decree of sale could be afterwards set aside,

“ Independently of the plea of the negative prescription, I

OPINIONS.

CUBBERSON  
v.  
HYSLOP.  
1837.

consider that the defences ought to be sustained ; but, on the separate ground of that plea also, if it had stood alone, I would have sustained them."

LORD COREHOUSE.—" I concur with Lord Mackenzie's opinion. We have had a great deal of ingenious argument on both sides, but into much of it I do not think it necessary to enter. The point appears to me exceedingly plain. There is no proposition better established than that the negative prescription cannot be pleaded directly against a right of heritable property. If it was otherwise, possession alone, without infestment, would complete the right, contrary to the Statute 1617, which requires a title as well as possession.

" I may possess a hundred years, but, if not infest, any competitor who has neglected his right for that time, may competently establish it, if his right is better than mine. This is settled law, according to every authority, and a numerous train of decisions. What is the result ? Not that the person who brings the challenge shall succeed because the negative prescription cannot be objected. But that both parties must produce their respective progresses, and compete upon them. They must trace back their respective rights to their common author, or to the Crown ; and he who has the best progress must be preferred. It is said, What is the use of the negative prescription in a question regarding heritable property if it can be only pleaded when you have the positive ? Does the law allow it only when it can be of no service ? There is a great mistake here. The negative prescription is of use not in being objected directly against an heritable right of ownership, but in trying the validity of the competing progresses, and in getting rid of various objections which might otherwise have been competent. For example, A disposes to B, B to C, and so on. One of these dispositions is objected to on the ground of forgery, or because it was impetrated by force or fraud. Now, all these objections are cut off by the negative prescription. For although exceptions founded on *ex facie* nullities, for example, that the deed is not subscribed, or that it is tested by only one witness, and the like, are not barred, yet all objections not appearing *ex facie* on the deed, are effectually cut off by the negative prescription.



“ The distinction was admitted in the cases *Paul v. Reid*, and *Boyes’ Trustees*. It was conceded on both sides, that although you cannot plead the negative prescription directly against a right of ownership, yet it may be pleaded against an action necessary to reduce a right *ex facie* valid.

CUBBISON  
v.  
HYSLOP.  
1887.

“ In this case I think the pursuer is not barred by the negative prescription from challenging the defender’s right, although she has not brought her challenge for forty years. But the result is, that the merits of each, as in competition, must be tried.

“ On looking to the defender’s progress, it will be found that his author having charged William Cubbison to enter heir to John, his grandfather, and to David, his father, led an adjudication against him, which was followed by a decree of ranking and sale, which came by assignation into the person of the defender Hyslop.

“ Then what is the pursuer’s progress? It is a general service as heir to her uncle John, as the person last infest in the lands. Now it comes to be a question which of these is the best progress? I think that there is conclusive evidence in process by the disposition 1769, that John’s right was a right in security only. There is also evidence that the debt was paid, for John granted a discharge by a writing under his hand, which would of itself have extinguished his infestment; and in addition to this he executed a reconveyance by the disposition 1769. Therefore, there was nothing which could be taken out of John’s *hæreditas jacens*, by the service to him.

“ What are the objections stated by the pursuer? She says that the disposition 1769 cannot be taken into view, as it was not produced till after the record was closed. The Lord Ordinary gives weight to this objection; but I do not think it well founded. For though it may be incompetent for the parties to make farther production of deeds after the record is closed, the Court itself often orders a deed to be produced *ad remandam veritatem*, and accordingly that was done here. The same thing was done, and is common in practice, in the cases of *Hamilton*, Nov. 15, 1828; *Thomson*, Feb. 21, 1828. I therefore think this deed of 1769 is now competently in process. It is evident that John’s right was discharged, and that

CUBBISON  
v.  
HYSLOP.  
1837.

a service to him could carry nothing. I agree with the Lord Ordinary, therefore, that this of itself puts an end to the question.

“How do the facts stand as to the decree of sale? It is objected, *first*, That William was in minority and abroad, and it was a decree in absence. But none of these objections can be stated in so far as William is concerned, as they are all cut off by the negative prescription, and the decree is good, notwithstanding the minority and absence of William. This is one of the instances I have alluded to, in which the negative prescription is of use in trying the validity of an heritable right.

“I am of opinion, therefore, that although the disposition 1769 were to be laid out of view, yet as Margaret Cubbison was a party to the decree of sale which is now unchallengeable, the defender must be assolizied from this reduction.”

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1. In SCOTT v. BRUCE STEWART, July 1, 1779, an infeftment was sought to be reduced, on the ground that the sasine had not been taken on any part of the lands conveyed, and that this had been done without any other authority than a clause of dispensation in the disposition flowing from the granter of the deed. In defence it was PLEADED,—If the objection had been made within forty years it could have been removed by the production of a title containing a crown warrant for the clause of dispensation in the disposition granted by the defender's author. The objection, therefore, does not import that there is any intrinsic nullity in the sasine, such as that the infeftment was only given in the presence of one witness, or that the notary and witnesses did

not sign the instrument. In such cases the nullity cannot be removed by any collateral production, or upon any production whatever. But the objection is altogether extrinsic. The sasine is good if properly warranted to be taken in that form by antecedent titles, and the only question is, Whether these must be produced in support of the sasine? If the challenge had been made before the prescription had run, this might have been required, but the objection comes too late after the right has stood unchallenged for forty years. The defender cannot now be obliged to produce grounds and warrants in support of the investiture. He is as little bound to produce the antecedent titles to instruct the granter's power of giving the dispensation, as he is to produce these titles

for instructing that the grantor was in the feudal right of the lands. The want of power is not a more essential defect than the want of right. The pursuer PLEADED,—The lapse of the years of prescription supplies the want of right to the property of the subject in the grantor of the charter or disposition which is founded as the title of prescription. But the charter and sasine produced must be in every respect complete according to the feudal forms. The lapse of forty years cannot supply any defect in the powers assumed by the grantor as to the manner of completing the conveyance. The fact of the infeftment not being taken on any part of the lands disposed, is sufficient in law to render it null, and no length of time can supply this essential defect, and the law will never presume that the grantor was possessed of the privilege alleged, as nothing is shewn to instruct it.

2. The Court found, "That the defender had produced a sufficient title to exclude." At the advising, LORD BRAXFIELD observed,—"The true question here is, Whether is the objection to the sasine extrinsic or intrinsic? If *intrinsic* then the sasine is null

from the beginning, and it cannot grow better by being older. A sasine may be a good sasine though not taken on the grounds of the lands in consequence of a dispensation from the Crown. Before prescription is run, the person who produces the title must remove the objection to it, but after the prescription the objection comes too late. It is the great purpose of prescription to support bad titles. Good titles stand in no need of prescription." LORD MONBODDO.—"It alters the case greatly, that this challenge has not been brought till after the years of prescription. The Act 1617 is our *Magna Charta*. I should be sorry to see it limited. The only objection here is as to the power of the grantor, and *that* after the years of prescription will be presumed." LORD JUSTICE-CLERK MILLER.—"The sound construction of the Act 1617 is of great moment. The question here is, Whether is the objection extrinsic or intrinsic? If there is no sasine there is no right, but here the objection is altogether extrinsic. It is an objection to the title to grant dispensation. How can that be good when an objection to the right of the holder is not good?"—*Hailes*, vol. ii. p. 811.

*Intrinsic Objections to a Title may be pleaded at any time notwithstanding the lapse of Prescription.*

I.—PATON *v.* DRYSDALE.

July 20, 1725.

This case is given in Volume I. page 194.

II.—AINSLIE *v.* WATSON.

July 25, 1738.

This case is given in Volume I. page 196.

1. In SHEPHARD *v.* GRANT, July 21, 1847, a deed of destination was sought to be reduced by the heir-at-law, on the ground that the first of a series of dependent substitutions was written on an erasure. The defender PLEADED,—The pursuer's right of action is cut off by the negative prescription, and this is a plea which the defender is entitled to maintain, although he may not have established in himself a positive prescription. It is admitted that where there is a competition of rights, no party can plead the negative prescription who has not established in himself a title by the positive. This, however, is not the rule where the negative prescription is pleaded in defence to an action challenging a deed upon nullities in it. When the question is not as to the right of ownership of lands, but a challenge

of a deed dependent upon various extrinsic inquiries, the right to prosecute such inquiries prescribed by the Statute 1617, cap. 12, like any other action. It was so ruled in the case of Paul *v.* Reid, February 8, 1814. The pursuer PLEADED,—The right to challenge deeds upon extrinsic nullities is cut off by the negative prescription. A deed, therefore, *ex facie* good, becomes unchallengeable by the lapse of forty years. It is not so, however, where the objection is intrinsic and apparent on the face of the deed. In such a case no lapse of time will validate the deed, or cut off the right to challenge it. It is immaterial that the objection cannot be made by way of exception, but requires to be made good by action of reduction.— In the case of Ainslie *v.* Watson, July 25, 1758, the objection was taken by action of reduction. The

Court, January 19, 1844, sustained the reasons of reduction. LORD WOOD, in the opinion returned by him, observed,—“It has been contended by the defender that the deed 1761 is now protected from challenge by the negative prescription. I do not consider this plea to be well founded. Assuming the deed to be invalid in respect of vitiations *in substantialibus*, I think that although more than forty years had elapsed from the death of the granter, that can be no bar to the pursuer having the fact of the *ex facie* nullity of the deed, which is a part of the progress on which the defender founds, declared, and the right to the estate as it stands, independent of that *ex facie* null deed, judicially declared.” The defender having appealed to the House of Lords, the judgment of the Court was affirmed, July 21, 1847. LORD LYNTHURST observed,—“The only remaining point for consideration is the negative prescription relied upon by the appellant. Now, even admitting that

possession under the deed of 1761 is to be calculated from 1790, the date of the investiture, and notwithstanding the existence of the life estate, which did not expire till 1807, such possession being founded upon a deed vitiated by erasure *in substantialibus*, and *ex facie* void, will not, I think, upon the true construction of the Statute of 1617, be sufficient to support the positive prescription, and if the positive prescription could not be maintained, the negative prescription must also fail. As to the argument that this being an action to reduce the deed of 1761, the right, being a mere right of action, is lost by the single effect of the negative prescription, the answer is, that the deed being vitiated by erasure *in substantialibus*, and in that respect a nullity on the face of it, the rule does not apply; and that in a suit brought, as in this case, to recover the property, such an obstruction to the title may be removed notwithstanding the provision of the Statute to which the appellant refers.”

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*An Adjudication, although followed by Charter and Sasine, if not accompanied with possession, is lost by the Negative Prescription.*

ANDERSON v. NASMYTH.

This case is given in Volume I. page 152.

March 3, 1758.

*All inquiry into prior Titles is excluded by the Positive Prescription, even although the prior Title is narrated in gremio of the Title on which Prescription is pleaded.*

I.—DUKE OF BUCCLEUCH v. CUNYNGHAME.

Nov. 30, 1826. THE Collegiate Church of Dalkeith was founded by James  
 NARRATIVE. Earl of Morton, reserving to himself, his heirs and successors, the right of patronage. The lands of Howden and Dechmont, in the barony of West Calder, formed part of the endowments of the church. In 1586 the titular provost and prebendaries, with consent of the patron, feued out these lands, and in 1587 the feu-rights were confirmed by the Crown, agreeably to the Acts 1564, c. 88, and 1584, c. 7.

By the Act 1587, c. 29, containing the general annexation to the Crown of the temporalities of ecclesiastical benefices, an exception was made of "all landis, baronies, tenementis, annual rentis, and uther commodities quhatsumever, quhilkis perteneit of befor to quhatsumever benefice, greit or small, being of laic patronages : to the quhilkis the said annexatioun sall not be extendit, nor comprehend the same, to the effect that nane of the saidis laic patronis be hurt or damnifiet thairby."

Again, by 1592, c. 158, it was declared, "that it was never his Majesty's intention ather to prejudge the saidis laick patrones in the patronages, or the person provided to the said prebendaries and chaiplanries, of any part of the frutes and emolumentis contained in the antient fundationes maid be the said laick patrones."

And it was enacted by 1661, c. 54, in reference to the vassals of provostries, &c., "that the entry of the saidis vassals by retour, &c., shall pertain to the laick patrons and their successors, who stand infeft in the said laick patronages holdin immediately of his Majesty."

The right of patronage of the above provostry, after remainin for some time in the family of Morton, passed into that of Buccleuch ; and accordingly, prior to 1778, all the vassals of the lands of Howden and Dechmont obtained entries from the latter family. In that year, however, Sir William Augustus

Cunynghame, who was proprietor of Over and Nether Craig, forming part of the barony of Calder, and which held directly of the Crown, having acquired the lands of Nether Howden and Nether Dechmont, which held of the Duke of Buccleuch, as in right of the lay patron, resigned the whole of these lands into the hands of his Majesty's commissioners, and expedite a Crown charter of resignation, on which infestment was taken and recorded in September 1778.

DUKE OF  
BUCCLEUCH  
v.  
CUNYNGHAME.  
1826.

The *Quæquidem* clause stated, that the lands had been resigned into the hands of the Barons of Exchequer, "tanquam in manibus nostris, immediatis superioribus prædictarum terrarum de Over et Nether Craig, cum decimis et pertinentiis, de quibus semper tenebantur, et tanquam immediatis superioribus prædictarum terrarum de Nether Howden, et Nether Dechmont, virtute annexationis superioritatis terrarum ecclesiasticarum ad Coronam, sicut eadem per prius tenebantur de Præposito ecclesiæ collegiatæ de Dalkeith."

The *Tenendas* clause in the charter was thus expressed: "Tenendas et habendas totas et integras prædictas terras, decimas aliasque supra specificatas, dict. Domino Gulielmo Augusto Cunynghame, ejusque prædict., modo infra mentionato, viz.—Dictas terras de Over et Nether Craig, cum decimis et pertinen., de nobis nostrisque regiis successoribus, immediatis legitimis superioribus earundem, in liberâ alba firmâ; et prædict. terras de Nether Howden et Nether Dechmont, cum pertinen., quæ per prius de Præposito ecclesiæ collegiatæ de Dalkeith tenebantur, de nobis nostrisque regiis successoribus, tanquam immediatis legitimis superioribus earundem, virtute annexationis superioritatis terrarum ecclesiasticarum ad Coronam, in feodo et hæreditate in perpetuum, per omnes rectas metas," &c.

The *Reddendo* clause was as follows: "Reddendo annuatim dict. Dominus Gulielmus Augustus Cunynghame, ejusque prædict., nobis nostrisque regiis successoribus, pro prædictis terris de Over et Nether Craig, et decimis rectoriis et vicariis earundem et pertinen., proportionalem partem unius partis calcarum deauratorum, vel pro eisdem duos solidos argenti, apud festum Pentecostes, nomine albæ firmæ, si petatur, tanquam alba firma divoria dict. totarum terrarum et baroniæ de Calder, cujus dictæ terræ de Over et Nether Craig fuerunt partes: Et reddendo.

DUKE OF  
BUCKLEUGH  
v.  
CUNYNGHAME.  
1826.

nobis, nostrisque regiis successoribus, *tanquam devenien. in loco Præpositi ecclesiæ collegiatæ de Dalkeith, virtute annexationis superioritatis terrarum ecclesiasticarum ad Coronam, vel domino erectionis dict. præposituræ, vel illis jus ab eo derivantibus*, pro supramentionatis terris de Nether Howden et terris de Nether Dechmont, diversas feudifirmæ divorias subtus specificat. viz., Pro prædictis terris de Nether Howden, cum pertinen., summam sex librarum trium solidorum et quatuor denariorum monetæ Scotiæ, ad duos anni terminos consuetos, festa, viz., Pentecostes et Sancti Martini in hieme, per equales portiones, tanquam antiquam feudifirmam inde solvi solitam, necnon summam trium solidorum monetæ Scotiæ pro annuâ augmentatione rentalis novæ feud." &c.

On this title Sir William was infeft, and in virtue of it he was enrolled as a freeholder in 1779, and thenceforth continued to possess the lands. In 1825 the pursuer brought an action of reduction of the defender's title to the lands of Howden and Dechmont, on the ground that he was the true superior of these lands. The defender pleaded his title to exclude.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—The titles of the defender are *ex facie* inept, for they refer to the act of annexation, and this shews that they were derived *a non habente potestatem*. The act of annexation was a public Statute, and it expressly excepts lay patronages. It is essential to a prescriptive title that it should be *ex facie* clear and unexceptionable. Were it otherwise there could be no *bona fides*. As, therefore, every one must be held to have been acquainted with that Statute, and as the Crown charter of 1778 expressly refers to it, the defender must be held to have known that his titles were derived *a non habente potestatem*, and therefore to have possessed in *mala fide*.

ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—It is not competent to go beyond the title itself on which prescription is pleaded. As therefore, it is affirmed upon the face of the title that the Crown was, by virtue of the act of annexation, the true superior, this must be held to be the fact, and no reference can be made to the Statute to disprove the fact. The Statute is merely the



ground or warrant of the title, but in a case of positive prescription it is not allowable to go beyond the title itself. Even although it were true that the title had been derived *a non habente potestatem*, yet as possession has followed upon the title without interruption for upwards of forty years, a prescriptive right has thereby been obtained. The very object of prescription is to cure bad titles, and so soon as prescription has been established in favour of a title, it is incompetent to inquire whether it has been derived from the true proprietor or not.

DUKE OF  
BUCCLEUCH  
v.  
CUNYNGHAME.  
1826.

LORD ELDIN, Ordinary, "Sustained the title to exclude founded on by the defender."

The pursuer having reclaimed, the Court "Adhered."

JUDGMENT.  
Nov. 30, 1826.

LORD BALGRAY.—"The case of the pursuer is quite untenable. The title of the defender is complete in itself, and he has had forty years' possession. Even granting that the titles had been derived *a non domino*, still he is entitled to plead prescription, whereby any inquiry into that fact, or into *mala fides*, is excluded. In the case of Forbes of Callander, a prescriptive title was sustained relative to coal, although originally it was excepted from the conveyance; but having been inserted in the subsequent titles, and possession having been enjoyed for forty years, the right to the coal was held to be undoubted."

LORD CRAIGIE.—"In general I concur in the opinion which has been delivered. I have always understood that the exception of falsehood in relation to prescription meant that the title was forged; but I have some doubts whether it would not apply where, *ex facie* of the title, there is a manifest falsehood. It may also be doubted whether the superior could, in such a case as this, acquire a prescriptive right, so as to give a valid title."

LORD GILLIES.—"It would be a serious question indeed, if we were to deny effect to a prescriptive title, because it appeared *ex facie* of the deed that the former titles had not been correctly deduced, or that a wrong one had been stated. This is truly the nature of the objection which is now made."

LORD PRESIDENT.—"It can scarcely ever happen that there

DUKE OF  
BUCCLEUCH  
v.  
CUNYNGHAME.  
1826.

is a prescriptive title without some falsehood connected with it. If the title be in itself perfectly good, and derived from the true proprietor, there can be no need of prescription, which is only necessary to cure bad titles. It may no doubt, as observed by Lord Craigie, be a question whether the Crown has acquired a proper prescriptive right, as superior of the lands ; but that cannot affect the vassal ; and so we found in the case of Spottiswoode. Indeed, the Crown is superior of all the lands in the country ; and if no other superior grants a title, the vassal may obtain one from the Crown ; so that here it is not correct to say that the titles in question have been derived *a non habente potestatem*."

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## II.—FORBES v. LIVINGSTONE.

Nov 29, 1827.

NARRATIVE.

The Earls of Linlithgow and Callendar were proprietors of the barony of Haining, and in the 17th century they feued out to the defender's predecessor certain parts of the barony, under reservation of the coal. The estates of the Earls of Linlithgow having been forfeited to the Crown in 1715, the defender's predecessor applied, under the Clan Act, 1st Geo. I. c. 20, to the Barons of Exchequer for a Crown charter of the lands held by him as vassal of the Earl. In 1716 the Barons of Exchequer accordingly granted a charter under the Great Seal, which proceeded upon the narrative, and bore to be in virtue of the Clan Act. The charter contained a grant of the lands and pertinents, and contained no reservation of the coal. On this charter infeftment followed in 1735.

The forfeited estates of the Earl of Linlithgow were sold by Parliamentary Commissioners in 1720 to the York Buildings Company, who were infeft in 1748, and the title granted was sufficient to carry the reserved coals under the lands feued by the Earl of Linlithgow to the Livingstone family. The right of the York Buildings Company was afterwards purchased at a judicial sale by the pursuer's predecessors.

In 1809 the pursuer's father brought an action to have it

declared that he had the exclusive right to the coal in virtue of his titles derived through the York Buildings Company from the Earls of Linlithgow. The defender raised a counter action of declarator of his right, and to the action by the pursuer pleaded a prescriptive title to exclude.

FORBES  
v.  
LIVINGSTONE.  
1827.

LORD CRAIGIE, Ordinary, Found, " That by the charter granted in 1716 by the Barons of Exchequer in Scotland to the defender (Livingstone's) predecessors, (in pursuance of the Act 1st Geo. I., statute 2, chap. 20, usually termed the Clan Act,) though conceived in unlimited terms, no greater or more extensive right to the coal or limestone could be granted, than had been formerly competent to the defender's predecessors,—the only purpose of such charter being to enable the defender's predecessors to hold of the Crown those lands which he formerly held, as vassals of the Earls of Linlithgow and Callendar; that the whole feudal property and rights which, in 1715, belonged to the Earl of Linlithgow and Callendar, who was attainted in that year, including the right to the coal and limestone to be found on the lands already mentioned, having been vested in Parliamentary Commissioners, were by them sold to the York Buildings Company, and thereafter, by a decree of sale obtained by creditors of the Company, transmitted to the pursuer; that, in virtue of the reservation of the coal and limestone in the original feu-rights already mentioned, these minerals continued a part of the estate belonging to the granters, as much as if no feu-rights had been granted, and consequently that the property thereof could not be lost by the negative prescription; that though the charter obtained from the Barons of Exchequer in 1716, combined with those which followed, and which are in the same terms, might afford a proper title of prescription, whereupon the defender (Livingstone) and his predecessors might have acquired right to the coal and limestone in question, the defender has not proved, or offered to prove, possession such as to establish a prescriptive right."

The Court held that there was a sufficient prescriptive title, and by a majority, also found that there was sufficient proof of

**FORBES**  
**v.**  
**LIVINGSTONE.**  
 1827.

possession in the lands of Tappuck, and that these lands formed part of the lands comprehended in the Crown charter of 1716, and assoilzied the defender.

**REMIT.**  
 June 29, 1825.

The pursuer having appealed to the House of Lords, the cause was remitted to the Court for reconsideration, with directions, *inter alia*, "specially to consider whether the defender has produced a sufficient title on which prescription can be founded, and to require the opinion of the Judges of the First Division in writing."

**ARGUMENT FOR**  
**PURSUER.**

**PLEADED FOR THE PURSUER.**—The Crown charter obtained by the Livingstone family in 1716 could not afford a title to prescribe, because the Barons could not, in virtue of the Clan Act, grant, to be holden of the Crown by the vassal of an attainted superior, any lands or tenements which he had not previously held of the superior. The charter proceeded on the narrative of its being granted in virtue of the Clan Act. It was therefore sufficiently obvious that it did not, and was not intended to convey any property such as the reserved coal, which had not previously been held under the attainted Earl; and the charter being thus incapable of carrying a legal right to the coal, could not form a valid title to prescribe.

The forfeited estates were vested in Parliamentary Commissioners, and by the Act 1 Geo. I. cap. 50, which was passed in the same session with the Clan Act, it was declared that any grant, under any of the Seals in England or Scotland, of the forfeited estates, or any part of them, should be null and void. The title, therefore, on which the pursuer pleads prescription, is null and void.

**ARGUMENT FOR**  
**DEFENDER.**

**PLEADED FOR THE DEFENDER.**—Although the Barons of Exchequer were not entitled to grant a Crown charter, except in the very terms of the rights flowing from the Earls of Callendar, and although the grant, therefore, might be considered as flowing *a non habente potestatem*, and as not sufficient to compete of itself with the title in the person of the pursuer; yet, as its general terms by legal construction implied a grant of the whole subject, comprehending the minerals as well as the sur-

face, it was a sufficient title to prescribe. If therefore prescriptive possession has followed upon this title, it must be secure now from all challenge. Although originally null under 1 Geo. I. cap. 50, that nullity has been cured by prescription, for that Act cannot be understood as repealing the Act 1617, chap. 12.

FORBES  
v.  
LIVINGSTONE.  
1827.

LORD PRESIDENT HOPE, LORDS GILLIES, MACKENZIE, ELDIN, and MEDWYN.—“ We are of opinion that the charter 1716, in favour of Mr. Livingstone’s predecessor, affords a sufficient title for prescribing a right to the coal in the lands contained in the said charter. An unlimited grant of lands carries right to the coal in such lands as a pertinent, though not specially mentioned. But it is said that this charter, in so far as it is held to be a grant of the coal, ‘ is void and null to all intents and purposes,’ in terms of the Statute 1st Geo. I. c. 50, and so not effectual for the purpose of prescription, because, at the time of the forfeiture of the family of Callendar, the coal in question, which had been reserved from the feu-rights granted of the lands, remained with the superior as a portion of the barony of Haining, and as such fell to the Crown, and was vested in Parliamentary Commissioners, under a prohibition to alienate any part of the forfeited estates, all attempts at alienation being declared void and null.

OPINIONS OF  
THE CONSULTED  
JUDGES.

“ We cannot adopt this argument ; for, *first*, This charter is not a grant of the kind contemplated in the Statute. It is not a new grant of any part of the forfeited estates in favour of a stranger to the lands, a donee of the Crown, but is a charter by progress, which, making no mention of the exception as to the coal, of new conveys these lands as having previously belonged to the grantee, but with the additional privilege of holding of the Crown, instead of the subject superior of whom they previously held. So far as it did not except the coal, an error was no doubt committed by the Barons of Exchequer, and the charter, in so far as it thus had the effect of conveying the coal, was null on the ground of error. Nullity, however, from error, is not a relevant ground of objection to a prescriptive title. On the contrary, prescription is in general pleaded to support a title originally invalid, it being otherwise not necessary to found on prescription. The alleged nullity of the

FORBES  
v.  
LIVINGSTONE.  
1827.

charter, from defect of form and delay in obtaining it, is equally irrelevant when considered as a title of prescription.

“ *Second*, Even if this charter could be viewed as a grant of the forfeited lands, and so originally falling under the Statute, yet still we are of opinion that it is a good title of prescription, and we cannot hold that the Statute 1st Geo. I. c. 50, made any inroad upon the Scots law of prescription, the grand security of our land-rights, so as to lay open the estates of proprietors to claims reaching back to the year 1715, to the effect that, after a century or more of peaceable possession, it should still be competent to allege that the estate had been forfeited in 1715, and therefore that the original grant was invalid, and all the subsequent investitures, with possession on them, good for nothing. The positive prescription operates by excluding all inquiry beyond the 40 years into the previous titles and rights to the lands, so that it is not competent to inquire, and consequently it cannot be known legally, whether lands possessed for 40 years upon a good *ex facie* title were ever forfeited or not; and therefore all the prior history of these lands is excluded. It is impossible to go back in the history of these lands to the year of the Statute, in order to bring its nullity into operation, however absolute that nullity may originally have been. We cannot now inquire whether the coal was in the hands of the Crown by forfeiture or not. We see Mr. Livingstone possessing his estate under a series of titles far exceeding the period of 40 years, the dispositive clause of which is sufficient to include the coal in the lands, and this is all that is required for founding the plea of a prescriptive title.”

LORDS BALGRAY, MEADOWBANK, and NEWTON.—“ We apprehend there can be no doubt that the reservation contained in the different feu-rights granted by the family of Callendar, to win the coal and limestone therein contained, was completely sufficient to preserve that part of the property to the superior, in whom, and his successors, therefore, it must be held to remain at the present day, unless an adverse title has been acquired by the defender, pleading the positive prescription.

“ From the nature of the original dispositions in favour of the defender’s predecessors, it will not be disputed that, had matters remained unchanged, they never could have been made

the foundation of a prescriptive title to the property in question, however long and uninterrupted his possession might have been. The reservation necessarily qualified the right, rendering it of the nature of a bounding charter ; and, in the face of his own written title, no one can acquire a feudal *jus in re*.

FORBES  
v.  
LIVINGSTONE.  
1827.

“ I. But the first question is, Whether, by the grant made in the year 1716 by the Barons of Exchequer, conveying the subjects originally feued out to the predecessors of the defender, ‘with parts and pertinents,’ a title of such a nature was obtained as would have been sufficient to enable the disponees, by continued and undisturbed possession, to have acquired a prescriptive right to the minerals ? And we are not inclined to dispute that, notwithstanding the reservation in the titles of the superior, had the charter of 1716 made no specific reference to the powers under which it was granted, and no qualification in the description of what was therein conveyed, but been a simple unqualified grant of the lands with the parts and pertinents, it might (provided the Statute 1st Geo. I. c. 50, to be afterwards mentioned, did not interfere) have been a title upon which to prescribe a right to the minerals in question.

“ But that is by no means, in our opinion, the nature of the grant before us.

“ In the first place, the *quæquidem* clause of the charter contained a distinct reference to the powers under which the grant was conferred ; and, in the second place, in the description of the subject conveyed it expressly limited the conveyance to ‘those lands which were then possessed and occupied by Alexander Livingstone and his servants.’ These two references to the powers of the granters, and the rights of the grantee, ought, in our opinion, to be taken and considered in the same light as if the Clan Act, by which the former were conferred, and the latter, by which the limits and nature of the property were described, had been quoted at length upon the face of the charter. But if they had been so given in the first place, it would have appeared that the granters had no right to convey to the grantees, the loyal vassals, any right which they did not previously hold of the attainted superior. The case is therefore to be viewed in the same light as if the Barons of Exchequer had declared upon the face of the document, ‘ We grant

FORBES  
v.  
LIVINGSTONE.  
1827.

you, to be held of the Crown, all that you formerly held of the attainted Earls of Callendar, but we have no power to grant you anything beyond that ; and, whatever may be the import of the words contained in this our charter, we have not, because we cannot, give you any broader right than that which you formerly possessed.' Had this been the situation of matters—and we hold that the charter must be construed as if it had been so conceived—we apprehend that, limited as the original right of the defender's author was, there would have been no *termini habiles* for acquiring a prescriptive right to the coal in virtue of the words ' parts and pertinents.' For, while we are most clearly of opinion that the fullest effect ought to be given to the admirable provisions of the Statute 1617, c. 12, we have never understood that these were intended to operate in favour of persons possessing, not in virtue of erroneous grants altogether absolute, fortified by prescription, by which, as purchasers and creditors may be deceived, such rights are and ought to be protected ; but of those under grants limited either by terms actually employed, or by a reference so clear and distinct as sufficiently to establish the defined and limited extent of the right conveyed.

" But the titles of the defender are not only limited by this reference to the powers of the granters, which left no ambiguity as to the nature and extent of what was intended to be conveyed, and therefore, in sound legal construction, must be held to have been conveyed ; but the dispositive words are in precise terms restricted ' as the said lands and others foresaid' (that is, the pertinents) ' were possessed and occupied by Alexander Livingstone and his servants.' Here, therefore, there is not only a reference to the original right of the defender's authors, but to the extent of his possession ; and, therefore, to entitle him to found upon this charter as a grant, the defender must, in our opinion, prove that it was possessed by his ancestor in the year 1716. But not only is there no proof of such possession, but the most direct and positive evidence to the contrary upon the face of the productions made by himself.

" Upon the whole of this part of the case, therefore, we are very clearly of opinion, that, as the prescriptive title founded upon has no ground on which to rest, except by inferring, from



the fact of the reservation not being expressly engrossed in the charter 1716, that the minerals are to be held and considered as parts and pertinents of the lands, while no such inference is allowable when the terms employed necessarily import a meaning directly the reverse, it cannot be sustained to the effect of derogating from the clear and unexceptionable title of the pursuer.

FORBES  
v.  
LIVINGSTONE.  
1827.

“ II. We are of opinion, that, even if there had been grounds for entertaining doubts upon this first branch of the cause, which we have been unable to discover, the Statute of 1st Geo. I. cap. 50, by which any grant or disposition of any part of the forfeited estates under any of the Seals of Great Britain, or in Scotland or England, are declared to be void and null to all intents and purposes whatever, would have been decisive of the present cause ; and that the defender’s title being granted in contravention of the enactment of this Statute, cannot be made the ground of such a right as that on which the defence is founded. Had the charter 1716 even contained an express grant of the coal, we are of opinion, that as such a grant would, by the operation of this Statute, have been from the first null and void to all intents and purposes whatever, it could not, by any after possession, have constituted a prescriptive title.”

LORD CRINGLETIE.—“ The charter 1716 to Livingstone did not contain the reservation of the coal. It granted the lands above mentioned, ‘ cum partibus, pendiculis, et suis pertinen. quibuscunque,’ &c. ; but in the charter this grant was explained to be, ‘ prout eadem totæ terræ aliaque suprascript. per Alexandrum Livingstone seniore, servitores et incolas possess. et occupat. per bondas, metas, et limites dict. terrarum aliarumque suprascript.’ The lands were therefore granted to Livingstone, not completely and fully, but as the same were occupied and possessed by the boundings, marches, and limits thereof ; and, consequently, although the reservation of the coal is not explicitly inserted in the charter, the grant is limited expressly to the manner in which they were possessed under the Earl of Callendar. The object of the Statute was directed to that express purpose, and it is referred to in the charter itself. It therefore could not be in contemplation of the Barons of Exchequer, neither had they the power, to extend the right of the

FORBES  
v.  
LIVINGSTONE.  
1827.

Livingstones beyond what they had by their feu-rights ; and if, by the terms of the charter, the right to the coal which had been reserved by the Earls of Callendar could in any way be understood to be granted to the Livingstones, such grant was declared by 1st Geo. I., c. 50, to be null and void to all intents and purposes. It therefore appears to me, that, as the charter 1716 refers to the boundings and limitations of the right contained in the feu-rights, and does so in virtue of the Statute referred to, the original feu-rights make a part of this investiture, and that it must be viewed in the same light as if the reservation of the coal had been engrossed in it, in which case Mr. Livingstone could not prescribe a right in the face of his own titles.

“ It is no doubt true that a charter of lands, without reservation of any sort, conveys a right to everything *a celo ad centrum*, and by consequence to the mines and minerals in them. But that cannot be permitted to be the construction of the charter 1716 ; because, in so far as it contains a grant of the coal and limestone which belonged to the Callendar family, it is null and void to all intents and purposes, and cannot be the title of prescription. If it be said that the Statute 1617 secures to any man who has charter and sasine, and possesses a subject peaceably for forty years, the subject so possessed, and this although the charter was granted *a non domino*, I answer, that the Statute 1st Geo. I., c. 50, repealed the Statute 1617 in the particular instance it had in contemplation. It declared all charters or grants in opposition to it to be void and null to all intents and purposes ; and certainly prescription is one of the intents and purposes of a charter and sasine ; for it appears to me that no man can acquire by prescription, upon a title which is in opposition to an express Statute posterior to that of 1617, or to the public law of the land, no more than he can acquire on any title whatever the sea-shore, or other subjects dedicated to the use of the public. I am therefore of opinion that the charter 1716 being in opposition to the purpose of the Clan Act, and in so far as it can be considered not to be limited to the terms intended by that Statute, being declared by c. 50 of same year to be null and void to all intents and purposes, it cannot be a title for prescriptive possession.”

At the Advising LORD PITMILLY observed,—“ I have again considered this case. The first question is a very important one in the law of Scotland, as to whether there is here a sufficient title to prescribe; and I am still of opinion that the validity of it as a title of prescription cannot be denied. No doubt, if a declarator had been brought within forty years of its date, it might have been found that the coal was not conveyed; but, after prescription, no such questions can be looked to. It is no matter although the titles flow *a non domino*—the only question is, whether they contain the subject, and possession has followed. If the Crown had in express terms granted the coal, it would have been null under the Clan Act, if challenged within forty years; but beyond that period it could not, unless the Clan Act was intended to repeal the Act 1617, which cannot be held. The Crown granted the estate with parts and pertinents, and it was quite competent to do so, and will carry all possessed under the grant, but all inquiry as to the powers of the Crown are cut off by the Act 1617. In addition to the cases quoted in the papers there is one of Monro in 1812, stronger than any referred to. Here the Court would not allow a charter beyond the years of prescription to be founded on; therefore on this point I agree with the Lord President, &c., that there is sufficient title of prescription.”

FORBES  
LIVINGSTONE.  
1827.  
OPINIONS AT  
ADVISING.

LORD ALLOWAY.—“ I entirely concur. The greater part of the land-rights of Scotland are held by titles in opposition to titles—as the Annexation Statute, for instance, and if we can go back 100 years, we can go back 500 years.”

LORD GLENLEE.—“ I concur entirely with the Lord President, &c., that there is a sufficient title.”

LORD JUSTICE-CLERK BOYLE.—“ I remain of the opinion I formerly expressed. I agree, in the words of Lord Meadowbank, that to doubt this title would be to shake to the foundation that Statute which is the palladium of the land-rights of Scotland. For admitting as much as can be desired the want of power on the part of the Crown, I am clear the Clan Act does not impinge the least on the effect of the Act 1617. There could not have been a doubt that this right would have been reducible within forty years, but after that

FORBES  
v.  
LIVINGSTONE.

1827.

JUDGMENT.  
Nov. 29, 1827.

the only question is, if the title was followed by sufficient possession."

The Court Found, "That the defender has a sufficient title on which prescriptive possession, in terms of the Statute 1617, cap. 12, may be pleaded."

### III.—HER MAJESTY'S ADVOCATE v. GRAHAM.

Dec. 10, 1844.

NARRATIVE.

The Abbacy of Eccles in Berwickshire, including under it the benefices of Eccles and Bothkennar, fell to the Crown at the Reformation, and was included in the General Act of Annexation of 1587.

In 1625 Sir George Home of Eccles conveyed the right of patronage of the parish of Eccles to James Earl of Home. The deed related *in gremio* an Act of Parliament said to have been passed in 1609, by which the temporality of the Abbacy of Eccles, together with the parish kirks of Eccles and Bothkennar, had been dissolved from the Act of Annexation, to the effect that his majesty might grant them to Sir George Home, and the deed assigned the Earl of Home in and to the Act of Parliament, in so far as concerned the patronage of the parish of Eccles.

There was no evidence that the Crown had ever exercised the power conferred upon it by this Act, and no copy of the Act was to be found in any record, but its title was mentioned in a list of the Acts in the reign of James VI.

From 1609 to 1690, when patronage was abolished, the patronage of the parish of Bothkennar was alleged to have been exercised by the Crown by repeated acts of presentation during that period.

In 1732 William Earl of Home conveyed to Mr. James Graham of Airth the patronage of the kirk of Bothkennar. The clause of assignation to writs and evidents assigned to Mr. Graham the Act of Parliament of 1609, and the assignation by Sir George Home of 1625. From 1732 the patronage of Both-

kennar was transmitted in the family of Graham of Airth upon personal titles to Mr. Thomas Graham Stirling, who succeeded to that property in 1816, and during that period the right of patronage on several occasions was exercised by that family. Their right to the patronage was also recognised in two processes of locality in 1774 and 1810.

HER MAJESTY'S  
ADVOCATE  
v.  
GRAHAM.  
1844.

In 1830 Mr. Graham Stirling exposed the patronage of Bothkennar to sale, when it was bought by the late Mr. George Lewis. Mr. Graham Stirling having died shortly after the sale, Mr. William Graham, his son, made up a title to the patronage, by obtaining a Crown charter of resignation on the procuratory contained in the disposition granted by William Earl of Home in 1732, and infeftment followed upon the charter in 1837. He then executed a disposition in favour of Mr. Lewis in 1838.

In 1842 an action was brought by the Crown against Mr. Lewis, concluding for reduction of the conveyance by Sir George Home in 1625, the disposition by the Earl of Home in 1732, the charter of resignation and infeftment of William Graham in 1837, and the disposition by him to Mr. Lewis in 1838. The action also concluded for declarator, that the patronage of Bothkennar was vested in, and belonged to the Crown.

PLEADED FOR THE CROWN.—The patronage of Bothkennar had been vested in the Crown, as a portion of the Abbacy of Eccles, and was held by the Crown as a part of the annexed property, and as a proper feudal subject, which could only pass from it by grant, in the form of charter and sasine. There had been no such conveyance made by the Crown in favour of any of the defender's authors. The assignation in favour of James Earl of Home was merely of the alleged Act of Parliament of 1609, and that only in so far as concerned the patronage of the parish of Eccles; the disposition of 1732 to James Graham, by William Earl of Home, and the other titles of the defender, therefore flowed *a non habente potestatem*. The proper patrimony and annexed property of the Crown was, by repeated Acts of Parliament, declared to be unalienable; and all dispositions and alienations made after the annexation, and without lawful dissolution in Parliament, and compliance with the statu-

ARGUMENT FOR  
THE CROWN.

HER MAJESTY'S  
ADVOCATE  
v.  
GRAHAM.  
1844.

tory requisites, were declared to be null, either by way of action or exception. Such being the case, the defects in the defender's titles to the patronage were not capable of being validated by prescription. The Act 1617, establishing the positive prescription, although it declared that prescription should run against the Crown, was not of universal application, and could not be held to overrule the effect of the Statutes of annexation, which it did not either repeal or alter. By force of these Statutes, the title of the defender's author was null, by way of action or exception, and therefore could never form a valid warrant for prescriptive possession.

The title of the Crown was further preferable to that of the defenders. The patronage in question was a feudalized subject; it had been dealt with in the defender's titles as such; and the right of the Crown to it was of a feudal character, and equivalent to one completed by sasine. In these circumstances no mere personal right could form a valid adverse title to the *ipso jure* sasine of the Crown, and no title not completed by infestment could be the foundation of prescriptive possession. The Crown being vested as under an infestment, could only be divested in the ordinary form applicable to feudal subjects.

ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—The defender and his predecessors have a good and habile title to the patronage of Bothkennar, standing in their persons for upwards of a century together. Upon this title an uninterrupted possession has followed for greatly more than the prescriptive period without any interference on the part of the Crown.

The disposition by the Earl of Home to James Graham in 1732, contained a clear grant of the patronage, and was an effectual foundation for a prescriptive right. It is a formal and regular deed, and free from any intrinsic nullity. The plea of prescription is a sufficient answer to all objections to the title, whether regard is had to the validity of the right as in the Earl of Home or his authors, or the subject-matter of the grant as being the annexed property of the Crown, even on the supposition that these objections were well founded in point of fact. The provisions of the Statute 1617 were most comprehensive in their terms, and while they expressly subjected the Crown

to its operation, they made no exception of the annexed property.

HER MAJESTY'S  
ADVOCATE  
v.  
GRAHAM.  
1844.

If it should be thought that the disposition of 1732 stood exposed to any of the objections of the Crown, in consequence of the recital made in that deed of the manner in which the patronage had been acquired by the Earl of Home, the defender was entitled to found his title upon the disposition and settlement by James Graham in 1746 and subsequent titles, on which sufficient prescriptive possession had run, and which did not make any allusion to the patronage having at one period been in the hands of the Crown.

Prescription having run in the defender's favour on a formal title, *ex facie* good and sufficient, all inquiry into the older titles is excluded, and it is no longer competent for the pursuer to raise any question with regard to the state of the right in the person of the Earl of Home, the defender's author.

DEFENDER'S  
SECOND PLEA  
IN LAW.

It is true that the titles by which the right thus acquired by James Graham was transmitted to his successors were personal titles merely; but sasine was not requisite to found prescription to a right of patronage, a personal title being sufficient, even in a question with the Crown. The objection that a patronage had been at one period feudalized in the person of the Crown, and consequently that a personal title could not compete with it, was one which was struck at by the law of prescription, equally with any other defect of title; the presumption of law, after the period of prescriptive possession had run upon the personal title, being, that the patronage had never been feudalized. But even were it the case, that a patronage once feudalized in the person of a subject, and held under a feudal title, could not be carried off by prescription on an adverse personal title, still it did not follow that the same effect was to be given to the constructive sasine ascribed to the Crown. The reason of the rule is, that when a patronage had been feudalized, sasine became necessary for the transmission of the right; but this had no application in the case of the Crown, which, it was indisputable, could be divested, and its disponent invested in a patronage by disposition alone without sasine.

LORD COCKBURN reported the case to the Court, and the

JUDGMENT.  
Dec. 10, 1844.

HIS MAJESTY'S COURT "Sustained the second plea in law stated for the defender on the record, and assoilzied the defender from the whole conclusions of the libel."

ADVOCATE  
v.

GRAHAM.

1844.

OPINIONS.

LORD JUSTICE-CLERK HOPE.—"I hold it to be clear law, that against a reduction and claim by the Crown, instituted to vindicate heritable property or rights, on the ground that the same formed part of the annexed property of the Crown, had never been dissolved, and had never, in point of fact, been disposed by the Crown, or not disposed *cum effectu*, owing to the absence of an act of dissolution, it is a relevant and sufficient defence to propone prescription under the Act 1617, c. 12—prescription, on a title to the right, fair and colourable—labouring under no nullities *in essentialibus*, and followed by the possession which is the great basis of prescription; and that when a case is raised sufficient to exclude challenge on other grounds, it cannot be obviated by the reply that the Crown can show, whether by reference to the title or otherwise, that it had been part of the annexed property of the Crown, and that no act of dissolution had passed. I think the inquiry into the origin of the title, and the grounds of challenge by the Crown, are excluded by prescription. We have here, *first*, A title, *ex facie* a regular disposition to an onerous acquirer, to a patronage which has never been feudalized previously in the person of any author of the disposer. *Second*, We have that title acted upon in all the ways in which the right could be asserted, by presentations,—in localities; and I daresay, although not mentioned, by open possession of a seat allotted to Mr. Graham as patron. *Third*, That title was produced and founded upon in legal questions connected with the parish, in which the Crown was called for its interest. *Fourth*, That title has been followed by possession, in character, continuance, and practical results, greatly broader and for a longer period than is necessary for prescription.

"Then on what grounds is effect to be denied to this prescriptive title? *First*, It is said that the patronage was part of the annexed property of the Crown; and I have no doubt it did fall under the general terms of the Act of Annexation, and therefore it is said it could not be alienated. But, 1. That is



just one ground of challenge competent to the Crown, and prescription is declared to take effect generally against the Crown, without any distinction as to one ground of challenge or species of title in the Crown, more than as to another. To my mind, that answer is of itself complete. 2. This ground of challenge is only reached by inquiries into the origin of the title of the party conveying the patronage in 1732, in order to show that the disposition flowed *a non habente potestatem*. It is a fixed principle of law, that such inquiries are excluded by the effect of prescription, and there is no distinction admitted by any of the authorities to render such inquiries competent against the party pleading prescription, when the challenge is by the Crown. To show that inquiries of any kind into the origin of the title, in order to prove that it flows from a person *non habente potestatem disponendi*, even when such inquiries are founded upon or proved by statements in the title itself as to its own origin, are not competent, it is unnecessary to do more than to refer to two well-known cases, *The Duke of Buccleuch v. Cuninghame*, November 30, 1826, and *Forbes v. Livingstone*, November 29, 1827. In the former of these cases the defender pleaded prescription, and contended, that although it were true that he derived his titles *a non habente potestatem*, yet the possession for forty years excluded inquiry into its origin. The reply to that defence was, that the title from the Crown in favour of the defender referred to the origin and source of the Crown's right—viz., the Act of Annexation—that under that Act the Crown had confessedly no right, as public patronages, of which this was one, were excepted ; hence, that as the title must be clear in itself, the inquiry into its origin was opened up by the title, and it proved that it flowed *a non habente potestatem*. This was a very strong case indeed ; for it was not the case, as here, of a party onerously acquiring from a former holder, but of a party beginning and making his prescriptive title, by going, as it was said, to a wrong superior, the Crown, and taking a charter from that superior. Yet the Court sustained the prescriptive title as a title to exclude.

“ This is a decision directly in point as to the competency of such inquiries into the origin of the title, and such objections

HER MAJESTY'S  
ADVOCATE  
v.  
GRAHAM.  
1844.

HIS MAJESTY'S  
ADVOCATE  
v.  
GRAHAM.  
1844.

to the validity of the granter's right, as are proposed by the Crown in this case. To sustain such inquiries and objections when stated by the Crown as the party challenging, necessarily amounts to an exception in favour of the Crown, from the most important effect of the prescription introduced by the Act 1617; and as I hold that prescription applies to the Crown equally in all respects as to subjects, I must find that there can be no such reply competent to the Crown, when excluded at the instance of a subject. Then this case was followed by *Forbes v. Livingstone*, November 29, 1827, which related directly to the validity of an alleged grant by the Crown, as contrary to the Clan Act, and appears to me to be a very direct authority upon the same question as that before us. I cannot see that it can distinguish that case from the present in principle, that the objection to the title as invalid, in respect of the provisions of the Clan Act, and flowing *a non habente potestatem*, was there stated by a subject claiming the property. It was surely as good a plea to him as to the Crown, if relevant at all against prescription, which must be rested on a sufficient title, to say—the title flows *a non domino*, since the Crown could not grant it, and so it cannot found proper prescriptive possession. By whomsoever stated, it is the same identical plea. But as prescription under the Statute 1617 is not a punishment for neglect, but a protection for the party in possession, the defence good against one party to exclude inquiry into the original validity of the title, must necessarily be equally good against any other party. The opinion of the Court in the case of *Forbes v. Livingstone* was expressly to the effect, that the positive prescription excludes all inquiry beyond forty years into the previous titles, so that it cannot be legally known what were the original titles, and their previous history is excluded.

“ But then it is said that the fact that the patronage was part of the annexed property is an essential nullity in the title, and that in order to make a title sufficient for prescription, it must not labour under essential nullities. But this is not an essential nullity. 1. It is not established or proved in the way in which essential nullities are proved, but by an examination and inquiry into the validity of the granter's right. Hence this is only another way of stating the point already adverted to.

2 No definition of essential nullities in the law of Scotland includes want of title in the granter of the deed on which prescription follows, and every explanation, on the other hand, limits the import of the exception to the ordinary meaning of the terms—nullities, *ex facie*, which deprive the title of the character of a formal, complete, and valid instrument. Want of power in the granter is not a *vitium reale*, pleadable against the prescriptive possession of the disponer, else the Statute truly effected nothing of value for the certainty of heritages. 3. The same alleged nullity did occur in the Duke of Buccleuch *v.* Cuninghame ; but in the words of Erskine, ‘ time was held to stand in place of all requisites,’ and the defect of power was held to be no ground of challenge. Further, if the inquiry is competent at all, there are other answers on the fact. It is said alienation of the annexed property without an act of dissolution is void. But here it is not proved by the references in the deed that there was any alienation by the Crown. On the contrary, I do not read the disposition of 1732 as a title in which the party acknowledges that he derives right from the Crown. It may stand perfectly well as a separate independent competing title, although with a reference to the means of getting such a grant from the Crown as might exclude the pretension that the patronage had fallen under the Act of Annexation, the explanation of which, being general in its terms, might often create difficulties without some such fortification. This is, I think, the just view to be taken in this question of prescription of the disposition by Lord Home, and even of the early grant to Lord Home by Sir George Home, a century before. I think we must hold that the right was claimed separately, although it was hoped that the Crown might put an end to challenge by a grant under some act of dissolution. Hence I do not think that any alienation by the Crown has been proved at all. On the other hand, if the inquiry entered into by the Crown were admissible, I could not hold that the existence of an Act of Parliament for the dissolution of the property and its tenor was proved either by the contents of the party’s own writs, or by any printed list of Acts of Parliament. That would be a very hazardous ground to take in a court of law ; and therefore I consider Mr. Dundas has very judiciously,

HER MAJESTY’S  
ADVOCATE  
v.  
GRAHAM.  
1844.

HIS MAJESTY'S  
ADVOCATE  
v.  
GRAHAM.  
1844.

in his last argument, laid aside the notion of an act of dissolution, and treated the case independently of any such slender support. However, in the view I take of the case, the inquiry into the origin of the title is altogether excluded, as the reasons of challenge of that title resolve into objections of the same character as those which have been often repelled; *e.g.*, want of power in the granter—defects in the progress of early titles, and an offer to prove that the true title in law was originally in another, from whom there is no conveyance. To exclude such objections, and in order to prevent the uncertainty as to rights of heritages, which the Act 1617 so emphatically describes as a great grief, was the very object of the Statute; and being, as Erskine says, for the benefit of the parties to be protected, and not founded on the notion of any neglect on the part of others, it would be on that ground declared to operate against the Crown as much as against any other party challenging rights fortified by the possession required."

LORD MONCREIFF.—"I am of opinion that the claim of the Crown to the patronage of this parish of Bothkennar, and on the grounds upon which it is maintained, are excluded by a valid prescriptive title fully established in the defender. The defender meets the claim of the Crown by a plea of prescription under the Statute 1617, c. 12, founded on titles and possession, stated to be sufficient in their own nature to sustain that defence, and to exclude all inquiry as to the merits of the original titles themselves, or into the merits of any other title which may be set up by any other party. It is, therefore, fundamental in the case, that this is a question of prescription. Whatever may be said about the original rights of the Crown on the effect of the Act of Annexation, in reference to other questions, they can have no effect here, unless they can be applied to a question of statutory prescription, when correctly pleaded by an adverse party.

"The Officers of the Crown meet this plea by an argument, which appears to me to be inconsistent with the whole principle of the statutory law of prescription. They present us with an elaborate deduction of what they state to have been the actual nature and merits of the titles by which this right of patronage had been held previous to the date of Lord Home's disposition

in 1732—one hundred and ten years before the date of the present action—the effect of which, when stripped of the special matter thus involved, is simply to infer that that title proceeded *a non habente potestatem*, and, therefore, that it, and all that followed on it, must be null and void.

HER MAJESTY'S  
ADVOCATE  
v.  
GRAHAM.  
1844.

“ If the principle of this plea could be listened to as a general doctrine, we might shut our books on the law of positive prescription ; for, in nine cases out of ten which have been tried in reference to that law, the allegation of the party seeking to evict the right prescriptively possessed, has been, that the original titles founded on had proceeded *a non habente potestatem* ; and I humbly apprehend, that if the Statute has any meaning in its preamble, and the enactment following it, the very purpose of it was to exclude any such inquiry, and to raise an absolute presumption of error, falsehood, forgery, or some other fatal nullity, against all the averments, and all the muniments founded on in support of them, for shewing that the titles by which the possession has been held were derived from some party who had no power to constitute them. The particular grounds on which such a defect of power may be alleged cannot alter the thing. Apart from prescription, the offer to prove that the title is derived *a non habente potestatem*, by a party who, but for that title, would have right to the property, is as relevant on one ground as on another. But, in a case of prescription, to answer the plea by undertaking to shew that, on the merits of the titles, the defender's author had not power to grant the dispositions, is, in my judgment, to do away prescription altogether. Without going so far as to say, with Lord Braxfield, in *Scott v. Stewart*, 10th August 1778, that ‘ it is the purpose of prescription to support bad titles : good titles standing in no need of prescription ’—I hold that it is the purpose of prescription to exclude all inquiry as to whether titles, *habile* in their form, on which prescriptive possession has followed, were in their original nature and constitution good or bad—and specially the inquiry, whether the author from whom they have proceeded have power to grant them or not. When prescription has run there is an absolute presumption that they are good. And, having this view of the objects of the Statute, I would say confidently, in the words of Lord Pitfour, in *Camp-*

HIS MAJESTY'S  
ADVOCATE  
v.  
GRAHAM.  
—  
1844.

bell *v.* Wilson, December 19, 1765, that this law of prescription, by so excluding all such questions, 'is the great security of our most valuable property, our land-rights.'

"If we have got thus far in regard to the principles which regulate the law of prescription, I should have thought that the present case should be of easy solution. There are titles vested in the defenders and their authors, from the year 1732, down to the date of the summons in the present action in 1824, which, according to all authorities, in the absence of every other inquiry, are *habile* and sufficient, as titles of prescriptive possession, for securing the right under the Statute. It may be, that the disposition by Lord Home in 1732 contains more than was necessary to its purpose. It narrates that Lord Home had right to the patronage of Bothkennar, in virtue of his undoubted right to the temporality of the Abbacy of Eccles, of which the kirk of Bothkennar is said to have been a part. This is probably true. But I humbly apprehend that it is foreign to the present inquiry on the effect of the law of prescription. If, whenever the charter, disposition, or other title, on which prescription is pleaded, refers to prior rights or titles as the foundation of the granter's own right, it is competent to investigate and try the whole merits as to the validity of such titles in the person of the granter, there would be an end of the law of prescription in a vast proportion of the cases to which it applies. Just take the common case of a charter of lands, with infestment thereon, or sasines standing together for a hundred years, and with full undisturbed possession—would it avail against the prescriptive right, that, in the original charter, it might be *narrative* set forth that the granter derived his own right from some prior title or specified grant, to the effect of enabling the party challenging this right in the grantee to try the whole question as to the validity of that prior title or grant, by reference to extraneous documents, or the general history of such rights? This would be just to say, that the Statute has no effect at all. But the case appears to me to be the same with regard to a right of patronage held by disposition, with prescriptive right."

LORD COCKBURN.—"The defender holds this patronage under a grant from a private party. The deed does not state or

imply that the patronage had been acquired from the Crown, or had ever belonged to it. On the contrary, it contains statements and provisions rather of an opposite tendency. All that it sets forth with respect to the disponent's title to dispend, is, that he is the 'undoubted owner' of the patronage. The defender and his predecessors have possessed upon this disposition for above forty years—at least I hold this to be the fact. He has not possessed upon a sasine, but only upon a personal title. A personal title, however, is sufficient for the prescription of a patronage.

HER MAJESTY'S  
ADVOCATE  
v.  
GRAHAM.  
1844.

"Now, I do not require to go beyond this single and well-established principle, that possession for forty years, upon an adequate title, no matter what it may happen to be, excludes all discussion of alleged pre-existing flaws.

"I am not aware that this principle is even attempted to be questioned in its application to the case of a private party. Suppose that the Crown was not here, but that the pursuer was an individual to whom, were it not for the defender's prescription, this patronage would belong. I do not understand it to be maintained that this private party could disturb the prescriptive title, by getting into objections which would have been irresistible if stated before the forty years had expired. In the case of all other objections, except that of feudalization, the defender himself does not maintain this. In law and in justice, there can be no stronger objections to a title than that it proceeded from fraud, force, incapacity, or *a non domino*. These are the greatest flaws that can exist, yet it is admitted, or at least it is certain, that prescription excludes the statement of them all—and, indeed, that this is its very purpose. It seems to be imagined that there is something peculiar in the objection, that the personal title is inconsistent with an ancient feudalization. But I see no peculiarity in this whatever. A personal title being sufficient for the prescription of a patronage, what charm is there in the objection of previous feudalization, that should let it in, as an objection, after forty years? I have no idea that the feudal title, without possession, could be preferred to the personal one with it.

"If this be the law between two private parties, I see no ground for any distinction in favour of the Crown. The

HER MAJESTY'S  
ADVOCATE  
v.  
GRAHAM.  
1844.

Statute enacts none. On the contrary, it secures parties against trouble after forty years, even from 'His Majesty.' Even as to the Crown, it excludes every objection except that of forgery. Accordingly, when, in 1630, the Crown availed itself of the statutory permission to interrupt current or past prescriptions, it made its act of interruption include patronages, and all its annexed property—a fact which seems to me perfectly conclusive. For I cannot suppose that the advisers of the Crown would have made it reach property against which prescription could not operate. This proceeding shews what was understood near the time of the Statute."

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1. In the case of *PATERSON v. PURVES*, March 10, 1823, the Earl of Marchmont in 1703 executed a procuratory of resignation in favour of certain heirs under the restrictions of an entail, and particularly that they should not alter the order of succession thereby destined. On this procuratory a charter of resignation was obtained, and infeftment followed. In 1731 his son Alexander, then Earl of Marchmont, executed an absolute procuratory in favour of his son, Hugh Lord Polworth. In 1736 the land was resigned, and an instrument of resignation was expedite, which narrated the former procuratory of resignation in 1703, setting forth, *inter alia*, that by it it was prohibited to alter the order of succession therein contained. A charter of resignation was then expedite, which narrated the titles expedite in 1704, specifying the limitations and prohibitions therein expressed pre-

cisely as had been done in the instrument of resignation. Infeftment followed on this charter in 1737, and in the instrument of sasine the provisions and restrictions of the investiture of 1704 were narrated in the same way as had been done in the instrument and charter of resignation. Hugh Earl of Marchmont executed a trust-disposition and deed of settlement, in which he directed his trustees to make over the lands to Sir Alexander Purves, the defender. Under the investiture of 1704, the daughter and granddaughter of Earl Hugh had right to the lands as they were therein destined to the heirs-female of Patrick Earl Marchmont, failing heirs-male. They therefore brought an action of reduction and declarator, in which they concluded to have it found, *first*, that the investiture of 1704 was still subsisting, and that the charter of 1736 was made under the limitations



contained in that investiture; and *second*, that in the event it should be found that the charter of 1736 was inconsistent with the investiture of 1704, it ought to be declared that the charter of 1736 was ineffectual, as flowing *a non habente potestatem*, and therefore effect should be given to the original investiture of 1704. The defender PLEADED a title to exclude, on the ground that by the charter and sasine of 1736, the lands had been conveyed to Earl Hugh, without any of the limitations imposed by the original entail, and that as he had possessed on that charter and sasine for more than forty years, he had acquired an effectual prescriptive title to the lands in fee-simple. LORD PITMILLY, Ordinary, Found, "that Hugh, the last Earl of Marchmont, having possessed the estate under the charter 1736 and infeftment in 1737, till his death in 1794, thereby acquired a prescriptive right in fee-simple; and farther, the pursuer not having been called to the succession under these titles, the defender, whose right was derived from the last Earl of Marchmont, had produced a sufficient title to exclude the pursuers founding their right on the entail in 1704." The pursuers having reclaimed, the Court, on the 19th of February and 27th May 1819, adhered. The pursuer having then appealed to the House of Lords, on March 10, 1823, "It was ordered and adjudged, that the interlocutors appealed from be affirmed."

2. In the case of HOPE VERE

*v.* HOPE, February 12, 1828, an entail of the lands of Craigiehall had been executed in 1708 by the Marchioness of Annandale in favour of her daughter the Countess of Hopetoun, and the second son of the Countess, *and the descendants of his body* without division; whom failing, to her younger sons and their descendants. The Countess was infeft on the entail in 1727, and in 1733, in the marriage-contract of her second son, the Honourable Charles Hope, she propelled the estate to him, *and the heirs-male of his body; whom failing, to the heirs-female of his body; whom failing, to other substitutes.* The concluding words of the destination in the entail were,—"*Conform to the destination of succession contained in the bond of tailzie of the estate of Craigiehall, made by the deceased Sophia Marchioness of Annandale, dated the 31st day of July 1708, and no otherways.*" A charter of confirmation and resignation was afterwards expedited by Mr. Hope, containing the same destination with that in his contract of marriage, and concluding with a similar reference to the original entail of 1708, but omitting the words "*non aliter*" following that reference in the destination contained in the contract. On the charter of resignation infeftment followed in 1733, and upon this title Mr. Hope possessed the estate till his death in 1791, when he was succeeded by his son William Hope Vere, who made up his title on retour in terms of the charter of 1733, the retour, like

the charter, referring in several parts to the original entail of 1708. On his death in 1812, his son, the pursuer, made up titles by service and retour, followed by infestment, all exactly in terms of his father's. In 1822 he raised a summons of declarator and reduction against the other heirs of entail, in which he concluded to have it found that the Countess of Hopetoun had no power to alter the destination contained in the entail of 1708, and that the destination in the contract of 1733 did not operate as any alteration of the destination contained in the entail of 1708. The defender PLEADED—That the alteration in the contract of 1733 of the original entail was now protected by prescription, and that the destination in the contract could not now be altered. The Court “Assolized the defender.”

3. At the advising LORD PITMILLY observed,—“I think the difficulty in this case has arisen almost entirely from the ingenuity of the pursuer's counsel; and unless we are to persist in the error of supposing the destination in the contract of marriage to be the same with that in the deed 1708, it follows that both defences are well founded. If we could arrive at the result embodied in the first conclusion of the summons, that the contract did not operate an alteration of the principal destination, then there would be no difficulty in the case at all. There would be no objection to the pursuer's title, nor would there be any occasion for reduction, or room

for the plea of prescription. We would only have to find that there was no alteration, &c. But though it is necessary for the pursuer to maintain this proposition, still he is obliged to say he cannot maintain it, otherwise there would be no use for this action. He says it is ‘in some respects,’ or ‘may be considered in some respects,’ different. He admits here that these two destinations are, or may be considered to be, different. He is thus obliged to modify his proposition, in order to make way for the reductive conclusions, which must represent the two deeds as different. But it is quite evident that the destinations in the two deeds are essentially and necessarily different; and if they were not, there would have been no need of reduction. This obvious distinction removes the whole basis of the pursuer's case, and opens the way to both defences, and shews them to be well founded. If the Countess of Hopetoun did what was a contravention, even if the years of prescription had not run, there would have been no title to pursue reduction of it. She could not have pursued such reduction, as it would have irritated her own right; and as soon as there were heirs of the marriage they were entitled to object. The whole puzzle arises from the words ‘conform,’ &c. There is some room for arguing as to these, that they apply only to the concluding substitutions, which were in reality conform to the previous destination. But suppose they apply to the whole destination, it only

proves that the framer was under a mistake in supposing the old entail to be the same, or that it authorized this destination; for there could be no mistake as to the meaning and effect of the destination in the deed of 1733, which was introduced, probably because the estate of Blackwood was destined to heirs-male. But this error cannot alter the legal effect of the destination in the deed 1733." LORD ALLOWAY observed,—“I agree that the question is to be determined by prescription. I conceive there cannot be a doubt that the deed of 1708 is a settlement on heirs-general of the body, and that it was not in the power of any heir of entail to alter that destination. But notwithstanding, we see in the contract of marriage entirely different terms used, and we cannot put the construction on them which the pursuer attempts to do. They could never mean heirs of the body, as in the old deed. Lord Pitmilley seems to think it arose from intention. I conceive there was no intention to alter; but I do not care whether it was by intention, or by what means the alteration came there, though I would conjecture that it was a mistake of the writer's, particularly as we see it refers to the other deed with a *non aliter*. That, however, does not affect the merits. Suppose the question had occurred within forty years, I think it would have been perfectly competent for the lady herself, or any of the heirs of entail, to have corrected the blunder by declarator or reduction.”

4. In the case of *MACDONALD v. LOCKHART*, December 22, 1842, John Macdonald of Largie became bound, in 1762, in his daughter's marriage-contract, to entail his estate in favour of his daughter and certain heirs-substitute, but under the provision that the eldest heir-female should always succeed without division. In 1763 Mr. Macdonald, in terms of this obligation, executed a strict entail of his estate, and the entail bore to be in implement of the obligation contained in his daughter's marriage-contract. The destination in the entail was conform to that in the contract, but it omitted the clause in the contract providing that the eldest heir-female should succeed without division. In 1773 the daughter of the entailer was infest under a charter of resignation proceeding on the procuratory in the entail of 1763. Her son Sir Alexander Lockhart, and her grandson Sir Charles Lockhart, were subsequently infest as heirs of entail in the years 1795 and 1817. Sir Charles left no son, but two daughters. The eldest daughter brought an action concluding to have it declared that the contract of marriage was the regulating destination, and that by it she was entitled, as eldest heir-female, to succeed to the estate, to the exclusion of her younger sister. The younger sister *PLEADED*,—The investiture of the entail has been feudalized by infestment, and possessed on for more than forty years, and the destination under it contains no preference of an elder heir-female over a younger.

Any personal obligation in the marriage-contract, at variance with this, is cut off by the long prescription, and cannot be saved by the mere reference which was made to the contract in the original deed of entail. As the result of the entailed destination is to call heirs-portioners to the succession, the entail is at an end, and the estate descends to the pursuer and defender as heirs-portioners in fee-simple. LORD COCKBURN, Ordinary, "Sustained the defences." In a Note he observed,—“No case has been stated, nor has the Lord Ordinary been able to discover any, in which, when an estate has been held beyond the years of prescription under a destination that is quite unambiguous, this title can be disregarded, or its import changed by reference to any separate deed, especially to one of a merely personal nature, and on which no possession has followed. Certainly the case of Zuille, 4th March 1813, founded on by the pursuer, has no such tendency, and the case of Vere, 12th February 1828, is strongly the other way. The entail having formed the foundation of the investiture of the estate for above forty years, any prior personal obligations by which the entail might have been corrected within that period, have been cut off, *quoad hoc*, by prescription.”

5. The pursuer having reclaimed, the Court “Adhered.”—LORD PRESIDENT BOYLE observed,—“I think the Lord Ordinary has rightly found that the youngest daughter is an heir-portioner.

Undoubtedly Mr. Macdonald undertook a personal obligation in the marriage-contract to execute a disposition preferring an eldest heir-female throughout the whole course of succession. But, either by accident or design, he did not fulfil that obligation. The very important provision in the contract, which was destined to that end, was wholly omitted in the tailzied disposition. Under that disposition a feudal title was made up, and the investiture of the estate, for a period far exceeding the long prescription, has been an investiture unaffected by that condition. It is impossible after this to go back upon the contract of marriage for the purpose of altering the prescriptive investiture. And the result will be, that the rule which was applied in the case of Gray Farquhar will apply here, and the entail will be held at an end, in respect that the estate has been taken up by heirs-portioners. The case of Craigiehall appears to apply *a fortiori*, to the effect of showing that the existing investiture cannot be now remodelled so as to square with the contract of marriage; and that the reference to the contract which was made in the disposition of 1763 cannot counteract the effect of an actual standing investiture for upwards of forty years, which was in favour of heirs whatsoever, and without any preference of an elder over a younger female.” LORD MACKENZIE.—“I am of the same opinion. There was an obligation undertaken in the marriage-contract to execute an entail with an exclu-

sion of heirs-portioners. And that obligation was not implemented. On the contrary, the entail which was executed omitted any such clause of exclusion. It is said that the entail professes to be in implement of the contract. So it does; but that does not prevent it from being actually different, and the omission of the clause in question is clear. Whether intended or not, such was the thing actually done. A mere reference to a deed of contract, not recorded, could not suffice to add a condition of this sort to an entail. I repeat, then, that the entail was made in violation of the contract, omitting the clause in question, and consequently containing a destination different from that in the contract. On this entail infestment followed. Thus a wrong was undoubtedly done. The entail was reducible, and action lay to compel an entail to be made up in precise conformity with the contract. Such action was competent to any heir of the destination in the marriage-contract, and *a fortiori* to any heir of the marriage who was also a substitute of that destination. But no reduction, or other action to compel implement of the contract, was brought. The lands were possessed by heirs under the entail, as actually executed, for more than sixty years. In consequence of this, that entail has been fortified by the positive prescription, as it was a title on charter and infestment which was the sole and actual title of possession of the heirs of entail during all that period. And, moreover, the right of action to

reduce the entail, and compel implement of the contract, has been cut off by the negative prescription. I think the case of Craigiehall was a case *a fortiori* of this, in every point which the pursuer raises here. I should also observe, that the plea maintained by the pursuer stands in this unfavourable position, that it is in substance a plea in support of the fetters of a strict entail, and therefore not to be strained in favour of the pursuer. If the pursuer could compel the insertion of the clause excluding heirs-portioners, the fetters of the entail would thereby be still continued; whereas, if the destination remains as it is, and heirs-portioners take the estate, the fetters of the entail are at an end." LORD FULLERTON.—"I concur." LORD JEFFREY.—"I entirely concur. I consider that the case of Craigiehall is a precedent *a fortiori* for repelling the plea maintained by the pursuer in this case. The mere reference to the marriage-contract, which reference is contained in the deed of entail, cannot affect the actual destination itself, which was contained in the deed of entail, and feudalized by infestment."

6. A vassal's possession is held to be the possession of the superior. A superior, therefore, after conveying the superiority of a subject to a party, but still retaining it in his own titles, may acquire it by the vassal in the lands obtaining an entry from him instead of from the party to whom the right of superiority had been conveyed. This point was clearly

brought out in the case of *FERGUSON v. GRACIE*, Jan. 17, 1832. In that case Edgar Dickson, the vassal, instituted a process of multiplepoinding for the purpose of having it determined, whether Mr. Fergusson of Pitfour, or Mr. Gracie, who stood in the right of the Earls of Haddington, was the proper superior of his lands. The lands were temple-lands, of which the superiority, as forming part of the barony of Drem, at one time belonged to the Haddington family. In 1657 John Earl of Haddington conveyed to Captain William Ross all the temple-lands situated within the sheriffdoms of Dumfries, Lanark, and Wigtown, and the stewartries of Annandale and Kirkcudbright. On the procuratory contained in the disposition, Captain Ross obtained a charter in 1658, under the Great Seal, from Oliver Cromwell, Lord Protector, by which the whole temple subjects therein contained were erected into a free barony, called the Barony of Rossisle, and on this charter infestment followed in Captain Ross's favour. The barony was afterwards conveyed to the Ross of Auchlossen family, and was thereafter adjudged from them by Mr. Fergusson of Pitfour. In 1747 his son, Lord Pitfour, obtained a Crown charter of adjudication of the barony on which he was infeft, and, in 1805, his son, James Fergusson, the uncle of the defender, exercised his right of superiority by granting a charter to the pursuer, as his vassal in the temple-lands in question, which were situated in Dumfriesshire, and

the pursuer was infeft. Notwithstanding the conveyance by John Earl of Haddington to Captain Ross in 1657, Charles Earl of Haddington granted a charter of the temple-lands in question to John Johnston of Elshieshiells in 1670. On this charter infestment was taken, and the usual composition for the entry of a singular successor, besides arrears of blench and other duties, was paid to the Earl of Haddington. No renewal of the investiture took place, and the lands were possessed on apperency until 1805, when the charter was granted by Mr. Fergusson.

7. *Mr. Gracie PLEADED*—The titles of Charles Earl of Haddington to the lands in question, were sufficiently broad to found a prescriptive right to these lands. A superior possesses by means of his vassal. The possession therefore of John Johnston and his successors in the property was the possession of Charles Earl of Haddington and his successors in the superiority. Charles Earl of Haddington having therefore possessed the lands by and through his vassal, John Johnston of Elshieshiells, to whom he granted a charter in 1670, upon which infestment followed, the successors of his Lordship have acquired a prescriptive right to the lands. *Mr. Fergusson PLEADED*—In virtue of the title which the claimant has produced to the lands and barony of Rossisle, comprehending the temple-lands in question, he is the rightful superior of these lands. The feudal right which was established in the claimant's

predecessor by his infestment, 1658, is not lost, nor capable of being lost, by the negative prescription. The competing claimant cannot plead the operation of the positive prescription in his favour, from the exercise of the right of superiority in one instance only, in 1670, by Charles Earl of Haddington, from whom he derives his title. The vassal who was then entered died a few years after the completion of his right, and no renewal of the investiture has been granted since that time by any party pretending to be superior, until the date of the charter granted in 1805.

8. LORD COREHOUSE, Ordinary, by an interlocutor, December 20, 1831, " Found, that the claimant, John Black Gracie, as in right of Charles Earl of Haddington, by progress, has produced a title sufficient to found a prescriptive right to the superiority of the lands of Temple-lands and Reid-hall, mentioned in the summons; Finds, that Charles Earl of Haddington, in 1670, granted a charter to John Johnston of Elshieshiells, as his vassal in these lands, on which infestment followed in 1672, when the usual composition

for the entry of a singular successor, with arrears of blench duties, and others, was paid to the superior; Finds, that since the death of John Johnston, the lands have remained in non-entry; Finds that the possession of John Johnston, the entered vassal, and of his heirs in apparence, for a period exceeding forty years, is to be held the possession of the Earl of Haddington, the superior, and his heirs and successors, the author of the claimant, John Black Gracie; and that it forms a good prescriptive right to the superiority of the said lands in his favour: Therefore, finds the said John Black Gracie is the only person entitled to enter vassals, and to receive the blench and other duties payable from the said lands, in terms of his claim, and decerns accordingly." Mr. Ferguson reclaimed, but the reclaiming note was refused on the ground of informality. LORD BALGRAY, however, observed,—“ It may be a satisfaction to the reclamer to know, that had the objection been got over, nothing would have been gained, as the interlocutor on the merits is well founded. The possession of the vassal is the possession of the superior.”

*Infestments proceeding upon Retours or Precepts of Clare Constat are a sufficient Title for Prescription without their warrants.*

THE EARL OF ARGYLE v. M'NAUGHTON.

Feb. 15, 1671.

NARRATIVE.

THE Earl of Argyle pursued the Laird of M'Naughton to remove from the lands of Benbowie, as being a part of the Earl's barony of Lochow. The defender alleged absolutor in respect of a sasine in 1527, proceeding upon a precept of *clare constat* from the Earl of Argyle in favour of Alexander M'Naughton, as heir to Gilbert M'Naughton, by virtue whereof the said Alexander and his successors had continued to possess the lands of Benbowie, and so had a sufficient defence upon prescription by the Act of Parliament 1617.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—The defence is not relevant, as it is founded on the naked sasine only; but the Act of Parliament 1617 requires for all prescriptions of land a title in writ preceding the forty years' possession. This title is distinguished in two cases. *First*, in relation to rights acquired *titulo singulari*. In this case there is required not only a sasine, but a charter which, although it may be excluded by an anterior or better right, yet if uninterrupted possession has been had thereafter for the space of forty years, it becomes an unquestionable right, and all other rights are excluded. But *second*, a greater favour is shewn as to the title of prescription of lands belonging to any party *titulo universali*, as heirs to their predecessors. In this case no charter is required, but sasines one or more continued and standing together for the space of forty years, either proceeding upon retours or upon precepts of *clare constat*. But the sasine in question, proceeding upon a precept of *clare constat*, cannot be a sufficient title for prescription, unless the precept of *clare constat*, which is the warrant thereof, be produced.

ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—The defence of prescription stands relevant upon the naked sasine only, and is supported by the clause in the Act of Parliament, where an heir's title of prescription is declared to be a sasine proceeding upon a retour



or precept of *clare constat*. The Act does not say that the precept and sasine shall be a sufficient title, as it does in the case of lands acquired, where it expressly requires a charter and sasine. It had been as easy in this clause to have required a sasine and retour or precept, but it doth only require a sasine on a retour or precept. The sasine relating the retour or precept is sufficient, and by long course of time sufficiently instructs the existence of retour or precept.

THE EARL OF  
ARGYLE  
v.  
M'NAUGHTON.  
1671.

The Lords " Found that there was no necessity to produce or instruct that there was a precept or retour otherwise than by the relation of a sasine."

JUDGMENT.  
Feb. 15, 1671.

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*Heirs founding upon Infestments proceeding upon Retours or Precepts of Clare Constat, are not bound to produce their original Charter, although it may be extant.*

MUNRO v. MUNRO.

IN 1649 Sir Robert Munro obtained a charter from the Crown of the lands and barony of Fowlis, comprehending the lands of Contulich. A few years afterwards he conveyed to his second son, George, the superiority of the lands of Contulich. A Crown charter followed in favour of George, upon which he was infeft on the 24th of June 1708; and he exercised his franchise from that period till his death in 1764.

May 19, 1812.  
NARRATIVE.

In Sir Robert's disposition to his son there was a clause, by which it is declared, " That the foresaid lands of Contulich shall be redeemable by me and my foresaids at any term of Whitsunday hereafter following, for payment or consignment of the sum of 1000 merks Scots money."

In the charter upon this disposition, the lands of Contulich were conveyed expressly to George Munro and his heirs-male and assignees, " sub reversione modo postea script." The *quæquidem* clause bore, that the lands formerly belonged to Sir Robert, and were conveyed " redemabiliter semper et sub reversione per dict. dominum Robertum Munro, ejusque hæredes et

MUNRO  
v.  
MUNRO.  
1812.

successores a dict. Georgio Munro, ejusque prædict. modo et cum premonitione in dict. contractu spectat. hic tenen. ut repetit. brevitatis causa." The terms of the redemption were no other-wise mentioned in the charter.

On the death of George Munro, his son, John Munro of Culcairn, made up titles as heir to him in the lands of Contulich by special service, and was infeft upon a precept from Chancery on the 15th of February 1765. The retour, precept, and instrument of sasine referred to the charter 1708 as follows :—  
" Et quod secundum cartam sub sigillo, per unionis tractatum custodiend. et in Scotia vice et loco magni sigilli ejusd. utend. ordinat. concess. per quondam Annam Reginam beatæ memoriæ, in favorem dict. Georgii Munro, patris Joannis Munro, nunc de Culcairn, inibi designat. Georgium Munro de Culcairn, filii legitimi natu secundi domini Roberti Munro de Fowlis, baronetti, nunc demortui, et hæredum masculorum et assignatorum ejus, de data, Junii anno millesimo septingentesimo octavo."

John Munro was succeeded by his son George Munro, who served heir in special to his father in the same lands upon the 14th of April 1767, and obtained a precept from Chancery, upon which he was infeft. These titles were made up in the same terms as his father's.

In 1775 George Munro executed a disposition of the lands of Contulich and others in favour of himself, his heirs, and assignees, containing a procuratory of resignation ; and in this disposition reference to the charter 1708 was for the first time omitted.

After the death of George Munro, his brother Duncan, the defender, expedé a general service to him, by which he connected himself with the procuratory in his brother's disposition in 1775 ; and having expedé a charter of resignation, he was infeft. In this charter and infeftment the right to the lands of Contulich bore to be absolute and irredeemable. The defender afterwards passed a Crown charter of the lands of Contulich upon his own resignation, upon which he was infeft ; and some time afterwards Mr. Munro conveyed this superiority to Sir Hector Munro of Novar.

The pursuer, as grandson and heir of investiture of Sir Harry, the eldest son of Sir Robert, the original disposer, brought an

action, concluding that the defender should exhibit his titles to the lands of Contulich, and that the same should be reduced, as inconsistent with the disposition by Sir Robert Munro to George Munro, on which they were founded. The summons further concluded, that it should be found and declared that the lands are redeemable, upon the pursuer making payment of 1000 merks Scots, being the redemption fixed by the said disposition ; and that the defender should be decerned to convey on receipt of that sum.

MUNRO  
v.  
MUNRO.  
1812.

The defender founded on infeftments upon retours, and pleaded that the lands had been possessed by him and his predecessors for more than forty years on irredeemable titles.

PLEADED FOR THE PURSUER.—The retour in 1764 makes reference to the charter of 1708. As therefore the existence of the antecedent charter is proved by the progress produced, it is incumbent upon the defender pleading the positive prescription to exhibit that charter. The Statute 1617 permits parties to plead the positive prescription on production of instruments of sasine, one or more, continued and standing together for the space of forty years, provided there be no charter extant. But where the charter is extant, it is absolutely necessary to produce it. In the case of a singular successor, he must produce his charter, that it may be seen what were the conditions of his grant ; but an heir possessing on renewals of investiture, is presumed to have had sufficient original right, and he is also presumed to possess simply and absolutely, if nothing to the contrary appears. But though these things will be presumed in his favour when the original charter is lost, it is an invariable rule of law that all presumptions must yield to truth ; and when the means of discovering the truth are in his power, from the charter being in existence, he is under the necessity of producing it ; and more especially in a case like the present, where the property was possessed, till within the years of prescription, on titles which uniformly bore reference to the charter.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE DEFENDER.—The construction put upon the Statute by the pursuer is supported by no precedent or

ARGUMENT FOR  
DEFENDER.

MUNRO  
v.  
MUNRO.  
1812.

authority. All that an heir founding upon infeftments proceeding on precepts of *clare constat* or retours is bound to produce are these infeftments themselves. He is not bound even to produce the warrants of these infeftments. Still less is he bound to produce the original charter of investiture. Even if he were to produce it, the Court would not be entitled to look at it, for independently of it a prescriptive title had been produced sufficient to exclude the opposing claimant, and all inquiry into titles prior to the prescriptive title is excluded. The charter of 1708, referred to in the narrative of the retour of 1764, was passed more than fifty years before the commencement of the prescription, and if it and other prior titles were null and void, and were now produced, they would not affect the defender's right, which is constituted by possession for more than forty years, following upon infeftments which are proved, *in gremio*, to have proceeded upon retours.

JUDGMENT.  
March 3, 1812.

LORD NEWTON reported the case to the Court, and the Court "Sustained the defences."

OPINIONS.

LORD GILLIES observed,—“This is a case of very general importance in law, but it is not one of any difficulty. There are three defences; the two principal ones are the positive and negative prescription; and it appears to me that they are both well founded. This is a question in which a party produces services and retours for more than forty years, during all which time he has possessed in fee-simple. It is said that in the charter there is a right of redemption, and that the purchaser is entitled to insist upon that right. In support of that plea, it is said that the Act 1617 provides, that it is only where the charter is not extant that the sasines are sufficient. It appears to me that the answer made to that plea is a good one. I think the defender fully warranted, by the argument which he uses, to say, that where the question is with the heirs, it is enough to produce the infeftments, and not the charter, even where the charter exists. The argument in support of that doctrine is conclusive, that if the charter were produced, and were found to be null and void, it would not deprive the party of his prescriptive title. That argument is supported by various decisions, where it was made out that the charter was good for

nothing, and it was found to be of no consequence. As that doctrine is agreeable to the decisions of the Court, so I also think it is founded in obvious expediency. In some cases, estates have descended and been possessed by heirs on universal titles, perhaps for two or three centuries. And if the pursuer's argument were well founded, then, even in these cases, a party might come forward and insist for production of the original charter, on which it might in many cases appear that there was no good right. I conceive that where an heir makes up his titles by infestment, it is a complete investiture ; and it is enough for him to say that he and his ancestors have possessed in virtue of infestments during the long prescription."

MUNRO  
C.  
MUNRO.  
1812.

The pursuer having reclaimed, the Court " Adhered."

May 19, 1812.

LORD MEADOWBANK observed,—“ I own that I did not at first feel confident on the first ground, as to the heir's right to withhold the charter where it is extant. At first view, the argument would rather seem to be in favour of the petitioner ; but, on the whole, it is safer to hold even there that the party whose title is challenged has a right to choose his own defence, and may either produce or withhold his charter or not as he pleases. He produced what the law held to be an exclusive title, and he is the judge whether he will produce any farther title or not ; and, *quoad* all the world, the charter is to be held as not extant if he does not choose to found upon it. That is the safer construction of the Act of Parliament, and is consistent with the general meaning of the judges who introduced the doctrine of exclusive titles. That is the doctrine of the law ; and it has been productive of immense tranquillity ; and I think we would strike at the root of the doctrine of exclusive title, if we were to go back and force parties to produce their charters, perhaps at the distance of centuries. Though the words of the Statute might sanction a different construction, I am satisfied that this is the sound and salutary view. I am therefore friendly to the interlocutor, even on that view of the case ; but I don't see a shadow of doubt on the other. No reversion can be said to be incorporated in a sasine, unless the import of it is clearly expressed in it. One is not bound to go and search for papers not upon record. I hold it to be quite

OPINIONS.

MUNRO  
 v.  
 MUNRO.  
 1812.

clear, that it is not in the sense of the Statute incorporated in the instrument of sasine, and therefore that it is good for nothing."

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*Prescriptive possession must be continuous, peaceable, uninterrupted, and exclusive.*

THE EARL OF FIFE'S TRUSTEES v. SINCLAIR.

Nov. 29, 1849.  
 NARRATIVE.

THE lands of Milltown formed part of the Earldom of Caithness, the property of John Earl of Breadalbane. In 1691 the Earl conveyed to John Sinclair of Brims the lands of Forsie, to be held *à me vel de me*, and the lands of Milltown, to be held *de me* only. Sinclair of Brims was succeeded by his son, John Sinclair of Ulbster, who was served heir to him, and who also acquired by purchase from Lord Breadalbane the Earldom of Caithness, including the superiority of the lands of Milltown. He conveyed to his brother Patrick the lands which had formerly belonged to their father, the lands of Forsie to be held of the Crown, and those of Milltown to be held of himself, in virtue of his right to the superiority of the latter lands acquired from Lord Breadalbane. After his death his son George, as heir of his father, disposed the superiority of the lands of Milltown in favour of Alexander Brodie of Brodie, who, in 1740, expedite a Crown charter, upon which he was infeft. The right to the superiority was conveyed in 1777 by James Brodie to James Earl of Fife. Lord Fife conveyed the liferent of the superiority to his brother, Sir James Duff, and they were both infeft, and were thereafter enrolled as freeholders in 1780, and continued to be so enrolled, Lord Fife till he became a British Peer, and Sir James Duff until his death in 1839.

In February 1726 Patrick Sinclair expedite a Crown charter of the lands of Forsie, which had been conveyed to him by his brother John along with the *dominium utile* of the lands of Milltown. The charter did not contain these lands, but the lands of Forsie only. In March following he conveyed to John Sinclair of Murkle the lands of Forsie and the lands of Milltown,

and the disposition granted by him contained an assignation to the Crown charter 1726. Upon this charter Sinclair of Murkle was infeft; and in the instrument of sasine the Crown charter was correctly recited, but the clause of delivery in the instrument erroneously bore that infeftment was given in the lands of Milltown as well as in the lands of Forsie.

EARL OF FIFE'S  
TRUSTEES  
&  
SINCLAIR.  
1849.

In May 1726 Sinclair of Murkle conveyed to his brother Francis the lands of Forsie, to be held of him as superior, and the lands of Milltown, to be held *a me vel de me*. In 1762 Francis died, leaving a settlement in favour of his brother, the Earl of Caithness, and the heirs-male, whom failing, the heirs-female of his body. Under this settlement the Earl had right to the lands, but he never made up any title to them. Having no heir-male of his body, the right descended to his daughter Dorothea, the wife of the Earl of Fife, who made up her title to the lands as heir of provision under the settlement of her uncle Francis Sinclair, and in 1768 she sold them to General Scott, by whom they were afterwards sold to Captain Dunbar of Westfield.

On the death of Sinclair of Murkle in 1761, his brother Alexander, Earl of Caithness, was served heir in special to him, and obtained a precept from Chancery, on which he was infeft, and in the infeftment the lands of Milltown were described as comprehended in the lands of Forsie. In the same year the Earl executed an entail, including, *inter alia*, the lands contained in his special service to his uncle, Sinclair of Murkle. Under this entail the succession opened first to the grandfather of the defender, who expedite a general service as heir of tailzie and provision to the Earl. He thereafter, in 1767, obtained a Crown charter of the lands of Forsie, comprehending the lands of Milltown, and was infeft. On his death his son, Sir Robert, was served heir to him, and in 1789 obtained a Crown charter of these lands, on which he also was infeft. On his death his son, the defender, was served heir in special to him in, *inter alia*, the said lands, on which he was infeft in 1797.

In 1775 the grandfather of the defender raised an action of reduction, improbation, and declarator of non-entry against the Countess of Fife, and the Earl of Fife, her husband, for himself and his interest. In this action he claimed the property,

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

or at least the superiority of the lands of Forsie and Milltown, which had been sold by the Countess of Fife in 1768 to General Scott, by whom they had been sold to Captain Dunbar, and in a ranking and sale at the instance of the creditors of Captain Dunbar, he objected to these lands being included in it. In this action Mr. Brodie of Brodie, from whom the Earl of Fife afterwards acquired the superiority of the lands of Milltown, was not made a party. In the action decree of non-entry was pronounced in favour of the defender's grandfather, and on the decree being pronounced, the objection to the property of the lands being included in the ranking and sale was repelled, reserving the pursuer's right to the superiority. He then, as the superior, made a claim for and received payment of non-entry and feu-duty. The lands having been afterwards judicially sold, Mr. Sinclair of Forsie in 1798 applied to the defender's tutors to give him an entry as vassal, and as the casualty for a non-entry was not taxed, he paid to him a year's rent. Thereafter, in March 1801, the defender's tutors granted a charter to Mr. Sinclair, which bore to be granted by them for the defender as the immediate lawful superior of the lands of Forsie, and also of the lands of Milltown.

In 1841 the pursuers brought an action of reduction against the defender and Mr. Sinclair of Forsie, in which they claimed the superiority of the lands of Milltown, but the action was dismissed, in so far as related to the defender, in consequence of an objection to the form in which it was libelled. A second action was brought in October 1845.

ARGUMENT FOR  
PURSUERS.

PLEADED FOR THE PURSUERS.—The pursuers are vested with the superiority in question, in virtue of the conveyance by James Brodie to James Earl of Fife in 1777. The defender has not produced a sufficient title to exclude the pursuers, in respect that the title founded on by him has not been followed by continuous and uninterrupted possession for the prescriptive period. In virtue of the title granted by Mr. Brodie, Lord Fife and his brother were enrolled as freeholders in 1780, and continued to be so enrolled, the former until he became a British Peer, and the latter until his death in 1839.

The decree by which the defender's right to the superiority



in question was said to have been established, was invalid and inept in a question with the pursuers, as being *res inter alios*, the late Earl of Fife having only been a party to those proceedings in right of his wife and for his interest, as having concurred with her in disposing with warrandice the *dominium utile* of the subjects, while the right of superiority acquired by the Earl individually remained then and thereafter unchallenged and undisturbed.

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

PLEADED FOR THE DEFENDER.—It is not competent for the pursuers to found on any titles prior to the date of the title produced by the defender, seeing that his title has been followed by possession for more than 40 years without interruption. The possession of the defender, by receiving payment of the non-entry and feu-duties, granting the charter in 1801, and levying the composition on entering the vassal, and the possession of the vassal under that title, was sufficient to establish a valid title to exclude the pursuers. The enrolment of the Earl of Fife and his brother as freeholders, was not relevant to infer possession in terms of the Statute 1617. The title of the pursuers was also excluded by the decree pronounced in favour of the defender, in the action of declarator and reduction at his instance. All objections to that decree are excluded by the negative prescription, and by the acquiescence of the pursuers and the authors in it, and they are not entitled to insist in the conclusions of the present action until that decree is set aside.

ARGUMENT FOR  
DEFENDER.

LORD CUNINGHAME, Ordinary, pronounced the following interlocutor :—" Finds, that the title of the defender, Sir John Gordon Sinclair, and his predecessors to the subjects libelled on, having been expedite under the authority of decrees of this Court, and being otherwise fortified by prescription, is sufficient to exclude the title of the pursuers : Finds farther, that the defender, Mr. Sinclair of Forsie, having held under the other defender, Sir John Sinclair, for forty years, without any competent challenge prior to the present action, cannot now be disturbed in his title or possession ; therefore, repels the reasons of reduction, sustains the third and fourth defences urged for Sir John Gordon Sinclair, and sustains the four first defences

**EARL OF FIFE'S TRUSTEES v. SINCLAIR.** urged for Mr. Sinclair of Forsie, and decerns : Finds the defender entitled to expenses."

1849. The pursuers having reclaimed, the Court altered the interlocutor of the Lord Ordinary, and Found, " That the defender has not produced a title sufficient in the circumstances of the case to exclude the action by the pursuers on the titles libelled on, as vesting them in the right of superiority of the lands of Milltown."

Nov. 29, 1849.

LORD JUSTICE-CLERK HOPE.—" A title to exclude implies an admission, in argument at least, that the pursuers' title is otherwise a good and preferable title. But as a title to exclude in general requires complete, exclusive, and continuous possession, it often happens, if the pursuers' title is preferable, that the effect and force of the title to exclude cannot be accurately estimated without considering the title of the pursuers, and the extent of the possession following on it. And here this is peculiarly the case ; for the pursuers maintain that their possession was never interrupted, and that, in the most favourable view of the defender's case, there was at least divided possession ; and hence, that the defender's case fails in one essential requisite of the title to exclude. That reply may obviously be made more formidable in a question as to a right of superiority, if the vassalage was originally constituted by grant from the pursuers' predecessor, and there has been only one entry taken from another party as superior.

" The Milltown and mill of Leurarie belonged *in plenum dominium* to the Breadalbane family before 1691. In that year they were feued out to Sinclair of Brims, by a title to be held under Lord Breadalbane. Sinclair of Ulbster acquired right to the superiority. The same Sinclair of Ulbster having right to the property, conveyed it to his brother Patrick for a feu-duty of £5 Scots. Sinclair of Ulbster conveyed the superiority to Brodie of Brodie, and Brodie to James Lord Fife ; and Lord Fife, and Sir James Duff as liferenter, were infeft in the lands as superiors, and enrolled, after a keen opposition, in 1780 ; and on that title Sir James Duff voted, and remained on the roll, until 1839. I understand the allegation, in point

of fact, of Sir James Duff having voted, not to be seriously disputed, so as to require probation.

“ Nothing occurred to divest Lord Fife or Sir James Duff. Their infeftment subsisted until 1839. By the other Sinclair—Patrick—and his brother, a title was made up to some of the lands conveyed by Sinclair of Ulbster to Patrick, correctly enough, under the Crown, of which they held. But, in the sasine, without any warrant in the charter, infeftment was by mistake taken in the lands of Milltown and mill of Leurarie, as if a Crown holding. That title was regularly and formally renewed by Lord Caithness, by retour and Crown precept. To the property he made up no title before his death ; and the property not being carried by his entail, passed to his daughter, Lady Fife, who was infeft in the same. Her husband acquired the superiority duly by transmission from Brodie, as already mentioned.

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

“ The vassalage to which she thus succeeded by the personal right derived through her father from her uncle, was thus constituted by the predecessor of her husband in the superiority ; for it was his predecessor who feued out the lands. And thus Lord Fife, by a regular progress of titles, was the superior of Lady Fife, who had no other title of possession to the property than the feu granted by her husband's predecessor. No entry had been taken by her uncle, and, of course, after her succession, an entry was not likely to be taken.

“ In 1775, before Lord Fife had acquired the superiority from Brodie of Brodie, Sir John Gordon Sinclair's grandfather raised a reduction and declarator, claiming, *first*, the superiority of Forsie, which was not disputed—the property of these lands of Milltown and mill of Leurarie ; and it was also a declarator of a non-entry also as to these lands, but did not call Brodie of Brodie ; and if intended to raise a competition, that action would have been as incompetent to try that point as the first action by the Fife Trustees, dismissed by us in 1844. Lady Fife was called, and Lord Fife as her husband, and her dispoinee, Captain Dunbar. Little progress was made in the action for twenty years. But, in the meantime, two important matters occurred. After the action was brought, Lord Fife completed a title to the superiority in question of Milltown and mill of

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

Leurarie. Three years after the action was brought, having the fee of the superiority, and having conveyed the liferent to Sir James Duff, they claimed to be enrolled on these lands expressly *inter alia* in 1778, and their claim was rejected by the freeholders. The main ground of rejection was expressly the erroneous title completed by a Crown charter and infeftment in the superiority by the mistake above mentioned, and that Sir John Gordon Sinclair had been enrolled thereon.

“ The case was most fully investigated in this Court under a petition and complaint by Lord Fife and Sir James Duff, to which Sir John Gordon Sinclair was the respondent, as the party personally interested. First, it was shewn that Sir John Gordon Sinclair’s claim had not included this superiority, although his charter did. Then, Sir John Gordon Sinclair said, ‘ But the superiority belongs to me.’ This point was elaborately argued, as appears from the session papers which I have read. Lord Fife and Sir James Duff answered, the prescriptive title founded on dates only from the Crown charter, for the previous infeftment was without warrant, was an entire mistake, and an erroneous title, and as the competition arose long within the period of prescription, it must be disregarded, the possession by the vassalage being undisturbed. This plea prevailed. The title of Sir John Gordon Sinclair was disregarded, and Lord Fife and Sir James Duff enrolled as in right of this superiority. Now this is a most important decision in the present cause. It expressly prefers and sustains the title of Lord Fife by a judgment which was opposed by the very title on which Sir John Sinclair now founds, and there has been continued possession on that decree. This point appears to me of the highest importance in the cause.

“ A variety of points were pleaded, but ultimately the question turned, as appears from the papers, on the question, Had Lord Fife and Sir James Duff a clear right to the superiority ? They founded on their charter and infeftment in the lands, and that there was a proper vassalage was not disputed. The competing title was disregarded. They were enrolled, and Sir James Duff remained enrolled, and voted until his death in 1839. I regard this procedure in two points of view.

“ In the *first* place, I view it as a decree giving effect to

Lord Fife's title in competition with the ancestor of Sir John Gordon Sinclair, and on that decree possession followed continuously and together for fifty-nine years, until 1839. Sufficient attention has not been given to the importance of that judgment in this point of view. It is a decree giving effect to the title by enforcing possession in a very open and public manner, and on that decree possession continued. Suppose Lord Fife's heir had claimed enrolment on his death, or on the death of the liferenter in 1839, apart from any change made by the Reform Bill, it would not have been possible to contend successfully that the benefit of that decree in 1780 had been lost.

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

" In the *second* place, I cannot concur with the Lord Ordinary in holding that the enrolment under a decree of Court is not possession of a superiority, especially in a blench holding. Whether complete possession, if founded on to support a title to exclude, is another question. But possession it certainly is ; and for twenty years afterwards it was the only possession by any one pretending right to the superiority. I regard it as proper possession, being a public right expressly attached to the right of superiority. Before that public right can be given there must be a title and proper possession. When the property does not belong to the party, there must be a proper vassalage, and then the superior is in possession by his vassal, although he had given no entry, though the lands may have been long in non-entry—which is a matter *jus tertii* to the freeholders—and although there are no feu-duties, or none have been paid. But further, it is possession on a decree giving effect to the right, in opposition to the title proposed by the defender's ancestor ; and although not of the same character as a decree in a declarator of right, still it is a decree followed by possession.

" These points were expressly brought into discussion in the question in 1780, which resulted into a competition between Lord Fife and Sir John Gordon Sinclair. Sir John Gordon Sinclair disputed Lord Fife's title and right. He maintained the title was vested in himself. He maintained that Lord Fife had no possession, and opposed his enrolment, which, he further said, could only be accomplished, in any view of the case, by a reduction of the titles in his person. On all these points the

**EARL OF FIFE'S**  
**TRUSTEES**  
 v.  
**SINCLAIR.**  
 1849.

Court necessarily gave judgment, for they repelled all these objections, in themselves relevant and fatal if well founded, and ordered Lord Fife and Sir James Duff to be enrolled. Now, that judgment really gave possession to them; it repelled all the objections which could be stated against their right; it sustained that right as complete in all the requisites to constitute a valid and effectual right of superiority; and it put them into possession against the opposition of the party having a competing title.

“ In this state things continued until the death of Sir James Duff in 1839. But in the interval occurred the facts on which the title to exclude is founded.

“ The action raised by Sir John Gordon Sinclair in 1775 seems to have been revived about twenty years afterwards; and the question was then tried, whether the property of these lands, Milltown and mill of Leurarie, belonged to Lady Fife or Sir John Gordon Sinclair. This question was elaborately argued, and we have had a very full view of the pleadings given to us. It was decided in favour of Lady Fife. The whole titles, both to superiority and property, were fully commented on. She admitted that Sir John Gordon Sinclair alone had the superiority of Forsie, which she never claimed. But she farther stated, that Lord Fife had the only title to the superiority of the lands of Milltown and mill of Leurarie, of which she claimed the property; and I cannot see that Sir John Gordon Sinclair ever openly claimed the superiority of these particular lands. When the question as to the property was decided in her favour, the judgment pronounced went too far, for it at once assilized the defenders, although Sir John Gordon Sinclair was clearly entitled to decree in the declarator of non-entry for the lands of Forsie, which indeed no one opposed. His petition shews that his application really related to the superiority of Forsie alone. It is clear that Lady Fife's advisers and Lord Fife understood this to apply only to the lands of which they had admitted that the superiority was in Sir John Gordon Sinclair; and it could not be otherwise, when, in the long paper on which the judgment of the Court had been pronounced, they pointed out so fully the different state of the titles as to the superiority of Forsie, which they admitted to belong to Sir

John Gordon Sinclair, and of the Milltown and mill-lands of Leurarie, as belonging to Lord Fife alone. When this decree came to be extracted, it was written out in terms of the summons. This is a decree of non-entry in the usual terms.

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

“ The Lord Ordinary holds this to have been *res judicata* against the Lady. It is not so founded on, and no such plea was maintained on the record. On the contrary, the counsel expressly stated, that they did not contend that it could raise the plea of *res judicata*. But it was contended that the facts as to the litigation gave importance to the acts which followed on that decree. Sir John Gordon Sinclair claimed a year's rent of the whole lands of Forsie and others from the vassal, and a composition from the purchaser ; and there is no doubt that the rent of the Milltown and mill of Leurarie was included. I am of opinion that the possession by this act can only date from the payment, and not from the date of the decree. There had been no decree against tenants—neither, no doubt, was that necessary from the nature of the case, as the vassal was to pay.

“ On this decree a claim was made by Sir John Gordon Sinclair in the ranking and sale, and sustained. To the mere effect of this I am not disposed to attach much weight. The possession of Sir James Duff was in no respect disturbed. The relation of vassal, constituted by the grant of his ancestor, was in no respect weakened or altered by any such payment. It has been found, at a very early period, *Harper, Jan. 25, 1672*, that civil possession by a decree is not sufficient in a competition against a preferable title. Neither am I prepared to admit, that, in a question of possession, a decree which is admitted not to be *res judicata*, or a judgment on the merits, is of the same force as a feudal title in the heritable subject, although the decree may have been followed by payment. I understand the benefit of a decree, which was a judgment on the merits ; but I see no authority which puts on an equal footing with a proper feudal title, a decree which is not pleadable as a judgment on the merits. But when the question is, whether the superior has thereby lost his vassal, and the relation destroyed which the superior's grant duly constituted, I have no doubt whatever that this decree, and the payment following on it, are wholly insufficient to establish a title to exclude. But, then, the im-

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

portant fact founded on by Sir John Gordon Sinclair is, that he granted an entry to the purchaser by a charter in 1801, by which the purchaser became his vassal, and held under him.

“ Whether the reduction, brought within the forty years, although dismissed, was a sufficient interruption, I need not consider, and abstain, therefore, from indicating any opinion on that point—except that I do not thereby mean to imply that I have formed any opinion adverse to the plea of interruption.

“ The charter is undoubtedly one of the most important acts of possession which a superior can exercise, and the vassal, from that date, holds unquestionably under the party so granting the charter. But the act was not of a character to destroy or evacuate the possession actually held by Lord Fife and Sir James Duff. It is assumed by the Lord Ordinary, and in argument by the defender, that neither could, after the charter 1801, have taken the trust-oath, or been kept on the roll, in respect that they were out of possession. Now, that is a complete mistake. *First*, the words of the trust-oath import no such result at all. But, *second*, it is a point which has been frequently decided, that the act of the vassal, by changing the holding, or even the loss of the superior's right to exact the feu-duties by a declarator of tinsel against himself, and by the vassal taking a charter direct from the Crown, does not impair the superior's right. In the very case in 1780, one point decided, and the only one reported, is, that though a decree of declarator of tinsel of superiority had gone out against Brodie of Brodie, and a charter had been obtained by the vassal directly from the Crown, so that all right to the whole profits and rights of the superiority were lost for the time, and the vassal held direct from the Crown, still that was no bar to the party acquiring the superiority being enrolled, for the relation of superior and vassal could not be destroyed by one act of that kind, even when originating in the fault of the superior, and that the possession of the vassal, holding directly of the Crown, was still the possession of the proper superior, whose grant constituted the vassalage. This has been decided also in stronger cases.

“ Again, in a case which I shall presently advert to, although the vassal had made up a regular title from the Crown, but



without notice to the superior, and was thus the direct Crown vassal, still the former superior was held not to have lost his right to exercise the superiority by the act of the vassal, and was enrolled accordingly, without the necessity of reduction; and this judgment was affirmed on appeal. Hence, I have no doubt whatever that Sir James Duff remained in the full right to exercise his superiority up to his death in 1839. If so, I cannot hold the possession to be such as to raise up a title to exclude. At the utmost it was divided possession; and that of course displaces the plea of a title to exclude—of which exclusive possession is, as here, an essential requisite.

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

“ But we must consider more attentively what the plea is which is founded on the granting of this charter. In the *first* place, the negative prescription cannot be pleaded against Lord Fife and Sir James Duff. The mere omission to do certain acts, whether granting an entry, not drawing feu-duties, casualties, or composition, is of no importance; and when the holding is a blench holding, the omission of such demands would be immaterial, even if the negative prescription could be pleaded.

“ Then, though the charter 1801 was an adverse act of possession, yet it was not equivalent to the possession by the vassal on a Crown charter for forty years. Throughout the argument it was assumed, that in regard to the effect of a prescriptive title, the case was the same as if a party had had full possession of the *plenum dominium* by the vassal having obtained a Crown title, and so consolidated superiority and property. But I cannot give such effect to possession which consists in the grant of a single entry to a vassal, even although that vassal had lived for forty years. But, in truth, Mr. Sinclair died in 1823, and after that there was no renewal of the investiture by the defender, Sir J. G. Sinclair.

“ While, therefore, there was clearly adverse possession, it was not, in my opinion, complete prescriptive possession, such as is required to sustain a title to exclude. As the majority of the Judges stated in the case of *M'Donnell v. Duke of Gordon*, the possession must always be judged of *secundum subjectam materiam*. Now, I cannot at all regard the possession by the grant of a single entry as equivalent to the actual and real possession of the lands by a Crown title consolidating the

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

*plenum dominium*. Yet this is the effect ascribed to the grant of an entry by a party as superior. I can find no authority or case giving this effect to one grant of an entry to an heir, and much authority adverse to the notion.

“ But there are other two considerations which are material in considering the weight due to this adverse possession :

“ 1. During the whole of this period, the prior and preferable title had the benefit of uninterrupted possession on the decree of the Court in the Enrolment Case in 1780 ; and of that benefit nothing had occurred to deprive them.

“ 2. And more particularly, this grant of an entry by Sir John Gordon Sinclair in 1801 was an act done only in virtue of the very same title on which they had opposed Lord Fife's right to the superiority in 1780, and which title had been disregarded as erroneously made up. At the date of the charter 1801, the case was not that Sir John Gordon Sinclair had acquired the superiority by onerous right, completed a title in his person, and then granted this entry. The charter was granted solely in respect of the former title, the legal effect of which Lord Fife knew had been considered in 1780, and of the terms of the extracted decree in 1796. Judgment it could not be called on the point. And, in the recent discussion, the exact state and effect of the titles to the superiority of these lands had been fully discussed ; and Sir John Gordon Sinclair had never directly asserted his title to this superiority in that discussion.

“ While, by the inattention of Lord Fife to his rights, this undoubtedly adverse act of possession did take place, and while I admit the importance of it, yet I cannot regard it as sufficient to sustain, in the circumstances, the title to exclude. The law has always been slow to give any effect against the true superior to the act of the vassal, whose feu flowed from one superior, in taking entry from another superior, or even in completing a Crown holding, although on an *ex facie* good warrant.

“ A very important case illustrating this point will be found in 1754—Campbell v. Stirling, M. 2439—and in other reports. Enrolment was there claimed by a party in possession of a proper wadset of the superiority. Various other points occurred ; but, both from the Reports and the Session and Appeal Papers,

this point came out distinctly—the vassal, Lord Forrester, had obtained, and not incompetently, although improperly, a Crown charter several years before the claim for enrolment, and so consolidated superiority and property; and it was therefore objected very strongly, that the right of superiority could now receive no effect, for there was no vassal at all.

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

“ But the answer, sustained in this Court and in the House of Lords, was this—viz., that the vassalage having been once duly constituted, could not be injured by the act of the vassal, even in that the strongest case of the vassal having obtained a Crown holding. No doubt, forty years' possession by the vassal of the *plenum dominium* would have consolidated the feudal rights, and excluded the superior; but, as Lord Monboddo's report bears (5 Sup. p. 812), ‘ The question here was about the possession of a feu-superiority, of which neither the feu-duty nor any casualty of the holding had ever been uplifted by the present superior or his authors. The Lords found, that the possession of a superiority was not properly by uplifting feuduties or casualties; but if the vassal possessed upon a right derived from the superior or any of his authors, then his possession was, in the construction of the law, accounted the possession of the superior, in the same manner as a master possesses by a tenant to whom he has given a tack, though he uplifts no rents from him. But what made the difficulty in this case was, that the vassal had taken a charter from the Crown, and had possessed the lands for several years without any challenge from the subject-superior. The question was, Whether his possession was by this means inverted; and whether or no the Crown was not to be considered in possession of the lands by its vassal, and not the subject-superior? And the Lords thought not, and that the subject-superior still continued in possession notwithstanding of this clandestine right taken from another superior. Lord Elchies said, that, in a competition with a third party about this right of superiority, the years during which the vassal possessed upon the clandestine right from the wrong superior, would be imputed into the prescription of forty years, provided only that the vassal did not possess so long upon the new right as that the old was lost by prescription.’

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

" Thus, during the forty years, even in that case, the possession of the vassal, although on a Crown title, would have been held still to be for the right superior ; and nothing short of the consolidation and possession of the *plenum dominium* for forty years could exclude the right superior.

" But there is a great distinction between such possession by a vassal in the actual occupation of the lands, who has also a Crown charter and infeftment for forty years—and the adverse possession in this case, by one superior granting an entry to the vassal to the prejudice of another, and *ex hypothesi* a preferable right of superiority—especially if not only that superior's infeftment remains undisturbed, but he also continues in the exercise of other rights attached to the superiority.

" In the *first* place, to make the entry at all effectual, the vassal must have continued on that title for forty years. That I think clear. If the vassal dies, and there is no renewal of the investiture, the effect of that adverse act is interrupted, and there is not a proper continuation of the adverse possession at all sufficient in a question of prescription. This point was not attended to in the argument, but is, in this question to exclude, of great importance. Though the last entry was from the defender, yet the vassalage was constituted by the grant of Lord Fife's predecessor ; and until another entry is granted, there is no continuous adverse possession whatever.

" I do not say that I apply to this case all the views stated by the Court as to the effect of a single act of presentation in the question of prescription, although the incumbent lived for forty years. It is not necessary to give any opinion on the abstract question which might arise on the effect of an entry when the vassal lived for forty years after the entry. I shall only say this, that the opinions of the Court in the case of *Glengarry v. Duke of Gordon*, 26th February 1828, will require very careful consideration, for some of them, as reported in the Faculty Collection, such as Lords Glenlee and Corehouse, bear directly on this very question, and unfavourably for the pleas maintained by the defender, founded on one entry by a party as superior. But, at least, I think it essential to complete the possession in such a case, and to make it continuous, that the vassal should live for forty years after the entry. If not, I

think the adverse possession is not continuous. On this separate ground, I think the defender's case fails. The possession was not continuously and together for forty years."

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.,  
1849.

LORD MEDWYN.—"It is not necessary for me to deliver an opinion at length in this case. Upon the whole, I concur in the view, that the defender has not succeeded in establishing a title to exclude. If the defender had possession for the requisite period, it was at best only a divided possession, and which had not the quality to entitle him to maintain successfully the plea of a title to exclude."

LORD MONCREIFF.—"I think this a difficult case; and though I do with some difficulty come to the same conclusion with your Lordship, my views on the case as argued before us are materially different.

"In the course of the discussions in this cause, my impression concerning the just result has occasionally varied. Whatever judgment shall be pronounced, it is of importance that nothing should be done, and no opinion of the Court indicated, which can be thought to trench in the slightest degree on the law of positive prescription under the Statute 1617, c. 12. The pursuers, by the summons now before us, maintain their right to the superiority of the subject in question by a deduction of titles as in their persons, in virtue of which they insist for reduction of those titles by which it appears to be at present vested in the defender. The defender, on the other hand, produces his own title by charter and sasine, connecting with previous titles under the Crown, expressly comprehending the same lands, whereby, and on an averment of exclusive and uninterrupted possession for above forty years, he maintains that he has a title by positive prescription sufficient to exclude the title of the pursuers, and to supersede and render incompetent all inquiry into the merits of the respective titles themselves.

"Accordingly, I understand the state of the case, as it has been argued before us, to consist simply in this question, whether the defender has produced, and has sustained by sufficient statements of fact, the title to exclude, on which he founds his defence, the defender declining to enter into any discussion concerning the intrinsic merits of the titles otherwise. In this

**FARL OF FIFE'S** the defender follows a course in which he is clearly justified by  
**TRUSTEES** the law of prescription and the practice under it, if he can  
**v.** establish his exclusive title on solid grounds.  
**SINCLAIR.**  
 1849.

“ Although, therefore, the pursuers have very naturally been anxious, in the various hearings we have had, to convince the Court, by a deduction of the earlier titles, that they have substantially the preferable right to the superiority of the lands in question, I think it altogether unnecessary, in the present shape of this cause, to form any opinion on the merits of the plea to that effect. All that I can hold is, that the titles exhibited by the pursuers are sufficient to place them *in titulo* to insist in the reduction of the defender's titles, unless it shall appear that those titles of the defender, with the possession averred, constitute a title by positive prescription to exclude the pursuers from any such inquiry.

“ The title to exclude, however, is set forth at length in the defender's statement on record in Articles II., III., &c., and VII. inclusive, consisting of charters and sasines connected by services from 1761 down to the defender's infeftment in 1797. And I understand the pursuers to have distinctly admitted that this is a sufficient title for prescription. The single point of controversy, therefore, is, whether the defender has shown sufficient possession on those titles, according to the terms of the Statute 1617, for more than forty years preceding the date of the present action of reduction.

“ The terms of the Statute are very clear and precise ; and whatever may be the result in any particular case, it is always of importance to keep them steadily in mind. It provides that whosoever his Majesty's lieges, &c., their predecessors and authors, have bruiked their lands and other heritages, ‘ by virtue of their heritable infeftments made to them by his Majesty or others their superiors and authors, for the space of forty years continually and together, following and ensuing the date of their said infeftments, and that peaceably, without any lawful interruption made to them therein during the said space of forty years, that such persons, their heirs and successors, shall never be troubled, pursued, nor inquieted in the heritable right and property of their said lands and heritages foresaid, by his Majesty or others their superiors and authors, their heirs

and successors, nor by any other person pretending right to the same by virtue of prior infeftments, public or private, nor upon no other ground, reason, or argument competent of law, except for falsehood,' provided they produce charter and sasine preceding the entry of the forty years' possession, or one or more sasines standing together for forty years, &c. If there is a clear title, according to the terms of the Statute, and such possession as the Statute describes, the right is secure against every challenge; and however plausible the show of a superior title may be, it would be an unspeakable mischief to disturb the effect of the law in this respect.

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

" But the possession must be—1. For forty years following the date of the infeftments, which is interpreted to be forty years backwards from the challenge, if posterior to the date of the titles. 2. It must be continual—that is, according to the nature of the right. 3. It must be peaceable; and, 4. It must be 'without any lawful interruption made to them therein during the forty years.' It is necessarily implied in these qualities descriptive of the possession necessary, that the possession must be exclusive. For, it could not be either possession for forty years at all of the disputed subject, or continual, or peaceable, or without lawful interruption, if during the period, or during any part of it, another party had any possession of that subject.

" The defender says that he has had such possession at least since 1796, which, if proved, would, in my opinion, be sufficient to establish the right. To make out this matter of fact, he founds—1. On the decree which was pronounced in 1796 at his instance, as successor, finding the lands to be in non-entry, and the defender to have right to enter on the lands, and to draw the rents as long as they should continue in that state. 2. On the fact, that in the process of ranking and sale of the estate of Dunbar, in whom the property of the lands stood, the defender made a claim to the arrears of rent. 3. That in virtue of a judgment by the Lord President Blair as arbiter, he was actually preferred to one-half year's rent; and, 4. That after some delay he actually obtained payment of that half-year's rent. But he farther says, 5. That Sinclair of Forsie, who purchased the lands, demanded an entry from the defender

EARL OF FIFE'S as his superior, and that in consequence of that demand a  
 TRUSTEES  
 v.  
 SINCLAIR.  
 1849.

charter was granted in 1801, on which Sinclair was infeft, and that on that title the possession has stood ever since. It was disturbed, indeed, by a summons in 1841, a few weeks within forty years from the date of the charter ; which summons, however, was found to be incompetently laid in regard to any interest of the defender, and was dismissed. And so the present summons, not having been raised till 1845, the defender says that prescription was completely run.

“ The plea of the pursuers is—1. That the possession alleged was not possession during the forty years from 1796 : That the decree obtained in that year was not possession, and that there was not any other possession till within the forty years preceding 1841 ; and that the summons in that year was sufficient, notwithstanding the defects of it in form, to interrupt the currency of the prescription. But then the pursuers say, 2. That such possession as the defender had, never was exclusive, in respect that Lord Fife and Sir James Duff had made up a title by charter and sasine under the Crown to this very subject, *inter alia* ; and that in virtue of that title they had been enrolled in the roll of freeholders, Lord Fife in liferent, and Sir James Duff in fee, in which right they continued—Lord Fife till he became a British Peer, and Sir James Duff until his death in 1838 ; and further, that one or other of them had, in virtue of that title, voted in various contested elections of members of Parliament for the county of Banff.

“ In this state of the controverted question of possession, I think that it is rather unfortunate that there should be any matter of fact not perfectly ascertained. Yet I suspect that it is so, though the particular point in which it occurs may not be necessary to the decision of this cause.

“ Looking back to the first plea of the pursuers against the possession alleged, the pursuers insist that the decree pronounced in 1796, which declared the lands to be in non-entry, at the instance of Sir J. G. Sinclair as superior, cannot be regarded as an act of possession. It is not maintained to be *res judicata* on the merits of the title. But the defender still says that it was an act of possession, or a judgment which gave him possession ; while the pursuers insist that, though it gave



him a right to possession, it cannot be taken as equivalent to possession itself. I do not think that this point is altogether free from doubt. For it might reasonably be held, that the demand of a declarator of non-entry was a demand of possession under the title, and that the decree which declared in terms of that demand was a decree vesting that possession, though it might require other procedure to render it absolutely effectual. I only mean, however, to express some doubt on this question, seeing that I do not think that, in any view, the case depends on it.

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

“ But the estate of the vassal Dunbar having been brought to judicial sale, the defender made his claim for the rents in the process of ranking and sale. Now, the fact to which I referred as not fully ascertained, is the date at which that claim in the ranking and sale was made. It is not specifically set forth in the record. An objection had been taken in the process of ranking and sale against the property being included in it ; and, on the 20th February 1798, after the decision in the declarator of non-entry in December 1796, that objection was repelled, reserving the defender's right to the superiority thereof, as accords. And the record bears, that ‘ the defender, as the superior, then made a claim for the non-entry duties,’ &c. I should infer from this statement, that the decree of declarator had been extracted before the 20th February 1798—that the defender was then a party in the process of ranking and sale—and that, immediately after that judgment in February 1798, he made his claim in the ranking and sale for the non-entry duties. Accordingly, I understood the Lord Advocate to state distinctly, that the decree was extracted before February 1798, and that the claim on the ranking was then made.

“ I consider this to be a point of importance. For, assuming that the defender, holding the decree of declarator, entered his claim in the ranking, in virtue of it, in 1798, it appears to me that that must be regarded as a positive act of possession. It was all that he could do ; for he could not get the rent from Dunbar, or from any of his tenants, while the estate was under ranking and sale. He claimed it, therefore, in that process ; and I think that the matter ought to be considered as if he had then obtained judgment for the rent, to which he was ultimately

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

found entitled. The delay in fixing the mere amount of the rent due to him cannot alter the legal effect of the claim as it was ultimately settled, for during that delay the common agent in the ranking must be held to have possessed all the rents for the several claimants according to their rights, and this particular half-year's rent for the defender, Sir John Sinclair.

" Then it farther appears that the defender obtained actual payment of the half-year's rent awarded to him by the deliverance of Mr. Blair, as arbiter, as confirmed by the judgment of the Court.

" The estate having been in the meantime sold to Sinclair of Forsie, he took an entry from the defender by the charter in 1801; and I thought that there was no question that, from that time, the possession, being under that title, must be considered as the defender's possession, at least till the first summons was raised, in 1841. For I am not prepared to hold, that if Sinclair, the vassal, died, the possession of his heir-apparent was not of the same character. No such point was pleaded to us, and I am not prepared to go on it. The defender was not heard on it.

" How, then, would the case stand if there were no separate question on the effect of the enrolment of Lord Fife and Sir James Duff? I apprehend that the prescriptive right would be established. For, 1. Assuming that the decree in 1796 did not constitute possession, I think that the claim made in the ranking and sale in 1798, though it did not receive effect till some time after, must be considered as a positive act of possession. I think that it is as much so as an action of maills and duties would be, though protracted, before decree, by the bankruptcy of the party or otherwise. But there was no interruption given to the possession so established till the first action was raised in 1841, before which time the prescriptive period had run. Then, 2. On the 10th March 1801 the charter was granted, and on the 11th March 1803 decree was given for actual payment of the half-year's rent found due to the defender.

" The summons in 1841 was executed on the                      day of March 1841. If the defender had legal possession in 1798, even that summons could not stop the prescription. But even

if it were otherwise, and if the case shall appear to depend on the effect of the summons in 1841, as an interruption of the prescription, there is a serious question involved in it. For though it was once said that a summons informal or incompetent in itself might operate as an interruption of prescription, I am not prepared to hold that doctrine. The summons in question was held to be incompetently laid, and was dismissed as to any conclusions against the defender, on that ground, by a unanimous judgment of this Court. But if that summons was not effectual to stop the currency of prescription, then there was no interruption of it until the summons now before the Court, which was dated and signeted on the 7th October 1845, was brought—before which time prescription, in every view, had run.

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

“ If, therefore, the case of the pursuers rested on this point, I should be of opinion that there are sufficient grounds for holding that the Statute must take effect to establish the exclusive title in the defender.

“ II. There is, however, undoubtedly another point, which presents a very serious difficulty in the defender's plea of prescription. It is not properly a statement of interruption, but rather a plea, that granting all that the defender says otherwise, he had not exclusive possession during the currency of the forty years, inasmuch as, during the greater part of the time, Lord Fife and Sir James Duff stood enrolled on the roll of freeholders on this very superiority, and actually voted in various contested elections for the county. This part of the case appears to me to be attended with considerable difficulty.

“ The claim of enrolment was made in 1779 by Lord Fife and Sir James Duff. The Lord Ordinary says in his note that it was not objected to. This is a mistake. Not only it was objected to, and objected to specially, by Sir John Gordon Sinclair, but the freeholders having sustained the objection, a complaint against that judgment was brought before the Court of Session under the Statute then in force. The case was discussed at large ; and it seems to have depended on this point, that Sir John Sinclair had obtained a decree of tinsel of superiority, and had then gone to the Crown and obtained a charter for infefting him under the Crown *supplendo vices*, on which he

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

was infest. But it was argued successfully, that the Act 1474, on which the declarator had been obtained, only inferred a loss of the non-entry duties during the life of the immediate superior, and that, in other respects, he continued to be still the true superior. The case is very shortly reported in the folio Dictionary; but there is a full report of it in Mr. Robert Bell's Treatise on Election Law, p. 84. And the judgment of the Court is given thus:—‘The Court were of opinion that the claimants were entitled to be enrolled—thus finding that the immediate superior, notwithstanding the declarator, still retained his right to the feu-duties, and all the privileges as Crown vassal; and, as having right to the feu-duties, he was to be considered as fully in possession.’ Thus it was held that the title of enrolment was good, and that there was sufficient possession to sustain it, even if the oath of trust and possession were tendered.

“Lord Fife and Sir James Duff having been thus enrolled under an express judgment of the Court, they were standing on the roll, when Sir John Sinclair obtained his declarator of non-entry in 1796. Lord Fife was only made a Peer of Great Britain in 1827, and Sir James Duff only died in 1839.

“Now the question which must be resolved is, Whether, while in virtue of their title, Lord Fife and Sir James were, as superiors, in the enjoyment and exercise of the elective franchise, it can be held that Sir John Gordon Sinclair had, on the facts already adverted to, not only a certain possession of the right of superiority under his own separate title, but an exclusive possession? There is some difficulty in it; but, on the best consideration I can give to the point, I am inclined to think, that even supposing the possession to have been otherwise sufficient for prescription, it cannot be stated to have been exclusive.

“The difficulty in the point which occurs to me is this:—In the discussion on the question of enrolment, the claimants were pressed with this objection, that they could not have taken the oath of trust and possession. The answer which was made to that objection was, that in fact they had sufficient possession, notwithstanding the declarator of tinsel, and Sir John Sinclair's charter and infestment, having still right to the

feu-duties. That is a part of the case which I do not perfectly understand, because, as I understand the titles now, it is stated by both parties to be a blench-holding, in which there could be no feu-duties. On that principle, however, the Court decided. But the difficulty here is, that in 1796 Sir John Sinclair obtained decree, finding him to be superior, and declaring the lands to be in non-entry, and Sir John to have right to the non-entry duties. Now, supposing that the judgment of the Court was perfectly right on the case as it stood in 1780, and that Lord Fife and Sir James Duff had sufficient possession to entitle them to enrolment, is it perfectly clear, that after decree of declarator of non-entry in favour of Sir John Gordon Sinclair, these parties could, without any reduction of Sir John's titles, be in safety to take the oath of trust and possession? I think this somewhat doubtful; for, by decree of the Court, Sir John Sinclair stood as the recognised superior in the lands; he claimed and obtained payment of a half-year's rent as non-entry duty; and, in 1801, he granted the charter to Sinclair of Forsie, which still stands unreduced; and, in granting it, obtained a composition for the entry.

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

"There is, however, a separate point connected with the question, which may, perhaps, in some measure, obviate the difficulty. I understand this to be a blench-holding; and assuming it to be so, it is, or was, a ruled point in the old election law, that, in the case of a blench-holding, the investiture in the title of superiority itself was sufficient to sustain an enrolment, and the parties so enrolled were to be considered as in possession, although, by the nature of the title, there was no feu-duty, or other return, which could be possessed. So the law is expressly stated both by Wight, vol. i. p. 257, and by Bell, 451, 452. Hence, when such titles of superiority came to be split and divided, and it was impossible for each of the parties who received portions of it to have possession of a single indivisible *reddendo* of a rose noble, a peacock's feather, &c., *si petatur tantum*, still the divided portions were held to give to each of the parties holding them a good title of enrolment, if the valuation were sufficient, and to justify each of them in taking the oath of possession. And this was all sanctioned by the House of Lords.

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

"In this view of the matter, the difficulty to which the Lord Ordinary alludes may not exist; and still Lord Fife and Sir James Duff may have stood upon the roll, and voted in various elections. And then the only objection comes to be rather of a fine and doubtful nature—that there being declarator of the defender's title as superior, and a warrant for entering on the lands, and that title having been exercised in the way to which I have already adverted, must it be held that there was still not an adverse title merely, but an adverse possession by the enrolment still standing in the books of the freeholders? I have not any doubt that a legal enrolment as a freeholder was an act of possession, supposing it to be validly established, in title and in possession. And all that remains is, that a contrary adverse title had been constituted, and confirmed by declarator of non-entry, and the actual levying of rent under that decree, as well as the entering of a vassal in the lands, and receiving the composition; and that that decree stood unreduced during all the years from 1796.

"We are not now so familiar with this branch of law as we formerly were, and there may be other views of this matter which I do not clearly see. But, on the whole, I am inclined to think, though not without some difficulty, that the possession had by Sir John Gordon Sinclair, from 1796 downwards, cannot be considered as having been exclusive, and therefore that the title to exclude by a prescriptive right has not been made out in the present case."

JUDGMENT,  
Nov. 29, 1849.

The Court then pronounced the following interlocutor:—  
"Alter the interlocutor: Find that the defender, Sir John Gordon Sinclair, has not produced a title sufficient, in the circumstances of the case, to exclude the action by the pursuers of the titles libelled on, as vesting them in the right of superiority of the lands of Milltown and mill of Leurarie: Therefore, and in respect that there is no defence on the merits, reduce the titles called for, and produced by Sir John Gordon Sinclair, vesting the superiority of the said lands in him, but in so far only as the same relate to the superiority of the said lands; and find and declare, in terms of the declaratory conclusion, that the pursuers have the only good and undoubted right and

title to the superiority or *dominium directum* of the said lands of Milltown and mill of Leurarie, and that the defender has no title, and has had no possession of the same, that can compete with the right and title of the pursuers, and that the pursuers, accordingly, are entitled to possess the said subjects, or the superiority or *dominium directum* thereof, and to uplift and receive all the duties, casualties, and emoluments thereto belonging; and prohibit and discharge the said defender from troubling and molesting the pursuers in the peaceable possession thereof: And in regard to the defender, Mr. Sinclair of Forsie, Find that the late Mr. Sinclair, his father, was warranted, in the circumstances, in taking out an entry, and paying a composition for the same to the said Sir John Gordon Sinclair, and that no claim can lie against the present defender, at the instance of the pursuers, in respect of the judgment now pronounced in their favour against the said Sir John Gordon Sinclair; and, therefore, in respect of the consent of the pursuers, assoilzie him from the conclusion of reduction, so far as directed against the title made up by the late Mr. Sinclair of Forsie; but find that he must now take an entry from the said pursuers, as the true and lawful superiors of the said lands; and in respect of the above finding in favour of the said defender, find that the said entry must bear to be a renewal of the title granted to his father, and must proceed specially on a recital of the present judgment of the Court, and decern: Find the said Mr. Sinclair of Forsie entitled to his expenses from the pursuers; and find the pursuers not entitled to expenses from the other defender."

EARL OF FIFE'S  
TRUSTEES  
v.  
SINCLAIR.  
1849.

1. Where a reservation in favour of a superior is not expressed in the original investiture, but appears for the first time in a renewal of the investiture, and where there is no evidence of any transaction between the superior and vassal in regard to the reservation, and where there is no act of possession of the reserved subject, on the part of the superior, the vassal will not

be held to have lost his right to the subject reserved, although the reservation may have been contained in his titles for upwards of forty years. The principle of this rule is, that where prescription is not applicable, charters by progress are to be interpreted agreeably to the original investiture, and all clauses in the original charter are held to be implied in

charters by progress, unless there be evidence to instruct an express alteration consented to by the vassal. In the case of *GRAHAM v. DUKE OF HAMILTON*, January 27, 1842, the pursuer brought a declarator against the defender, his superior, for the purpose of having it declared that he had the sole right to the coal and lime within his lands, notwithstanding a reservation of them in favour of the superior contained in the pursuer's titles. The original investiture in 1657 contained no reservation. In 1731 the vassal then in possession disposed the lands to his son, and infestment followed on the disposition in his favour. On the son's death a charter of confirmation with precept of *clare constat* was granted to the grandson. Immediately preceding the warrant for infestment, a clause was inserted, reserving to the superior the coal and limestone within the lands. There was no evidence of any transaction having taken place between the superior and vassal, in consideration of which the reservation had been inserted. The ground of the action of reduction was, that the reservation, if not inserted *per incuriam*, must have been inserted and repeated in the subsequent writs *obreptione*. The defender PLEADED—That the pursuer and his authors had held the lands for upwards of forty years, under a series of charters and sines, conferring on them a limited right only, and that it was incompetent, by reference to the previous titles, to go back and explain away, or alter, or qualify, the in-

vestiture secured by prescription, as to do so would be contrary to the very principle of the Statute 1617, the object of which was to exclude all such inquiries. The Court "Found that the defender had no right to the coal and limestone within the bounds of the lands in question, and declared and reduced in terms of the conclusions of the pursuer's summons."

2. LORD CUNINGHAME in a Note observed, "It is true that the reservation now under consideration has been inserted in successive charters, taken by the vassals for a period now extending back for sixty years; and if these reservations had been acted on by the superior's raising coal for the years of prescription, an unchallengeable servitude would probably have been created. But when no coal has been wrought, the Lord Ordinary doubts if there be any room for prescription in favour of the superior adverse to the ancient title of the vassal. For if the parties found solely on the title-deeds, without any overt act of possession thereon, then the vassal is entitled to meet the reservation founded on by the noble defender, by the prior grants in his (the vassal's) favour, confirmed or homologated by the same charters in which the reservations are inserted. These not only confirm the original grants, but stipulate for the same feu-duties agreed to be given for the lands, including the minerals and other pertinent attached to the lands feued. When the error or inefficacy of any clause



in a charter of renewal is manifest on the face of the title, it is apprehended that it is never too late for a party interested to object to it so long as matters are entire; and so long as the parties have not, by some visible act and deed, admitted possession under the claim for the years of prescription. In all questions as to the rights of parties, the original grant must be the regulating title. Accordingly, this doctrine seems to have received effect in the late case of the Duke of Montrose and Bontine, where a feu-duty stipulated in an original feu-charter, but omitted in the later charters of renewal for a period exceeding the years of prescription, was nevertheless found due, because the vassal had in fact possessed no exemption, but had paid or accounted for the feu-duties to a comparatively recent period to the Duke of Montrose, as assignee of the Crown. On the same principle, as the noble superior here has had no possession adverse to the original grants in favour of the vassal's predecessors, it is apprehended that the right of the latter to the minerals, and all other pertinents included in their ancient feus, is still entire." At the advising LORD JUSTICE-CLERK HOPE observed,—“There is no doubt that if the vassal had, on a renewal of the investiture by resignation for a new grant, taken his right subject to the reservation, and so taken infeftment under the superior, and it was proved that there had been a new transaction, the vassal could not have repudiated the reservation. But when

there is no evidence of a new transaction on the face of the deed, or by acknowledgment of the vassal, I cannot hold, in the circumstances, the introduction of this clause in the precept of *clare constat* in 1778 to be the proper form in which such reservation should have been made; and therefore must hold that it was inserted without warrant. I am of opinion that we should decern in terms of the conclusions of the summons, and repel the defences.”

3. In the case of THE DUKE OF MONTROSE v. BONTINE, June 20, 1840, the pursuer, as keeper of the Castle of Dumbarton, claimed the feu-duties of the lands of Cardross, which by Statute 1584, cap. 8, had been assigned for the keeping of that Castle. The feu-duties had continued to be paid to the pursuer and his predecessors till 1810. The defender PLEADED—The lands are held blench of the Crown, under a charter granted in 1761. As, therefore, the investiture in blench was established by this charter and the subsequent titles, the previous investitures under which feu-duties were payable must be held to be extinguished. The pursuer's right is nothing more than an assignation to the feu-duties, and no feudal right has ever been interposed between the Crown and the Crown's vassal. The pursuer PLEADED—The charter of 1761, founded on by the defender, cannot be pleaded upon as a ground of immunity in the face of the pursuer's titles, and the continued use of payment up to a recent date.

If no feu-duties had been paid for more than forty years, the defender's authors might have acquired a prescriptive right, but the continual payment of the feu-duty fortified the right of the Duke, as the defender and his authors thus took no benefit from their charter of immunity.

4. LORD JEFFREY, Ordinary, "Found that there were no feu-duties in existence to be the subject of the pursuer's demand, and consequently no *termini habiles* for his insisting in the present process." The pursuer having reclaimed, the Court "Altered the interlocutor of the Lord Ordinary, and decreed in favour of the pursuer." LORD JUSTICE-CLERK BOYLE observed,—“The omission to engross the feu-duties in the charters appears to have been held to be of no consequence by all concerned, for the vassal continued as before to pay his feu-duties regularly to the Crown grantees, and thus the burden of feu-duties never could be worked off. I have no conception but that this was a mere omission, and not with any view of making an exemption. For where is there a trace of the lands, out of which these feu-duties were exigible, being declared exempted by any Crown title from future liability in payment of feu-duties? I can see no principle for holding that such exemption has been established; and keeping in view the fact of payment down to 1810, there can be no pretence for saying that the right has been lost by the negative prescription running in favour of the defender. Looking

then to the pursuer's long series of titles, I hold it to be our duty to alter the Lord Ordinary's interlocutor. I think the pursuer's title impregnable." LORD MEDWYN observed,—“The lands formerly held ward were unquestionably only the lands of Ardoch Bontine, the others being held feu, and the Crown vassal acknowledged that the conversion of the taxed-ward into a blench-holding did not apply to the lands originally held in feu-farm, and that he was not liberated from this payment, for he continued the payment to the family of Montrose down to the year 1810. The present action was raised in November 1837, so that there is no prescription against the right. A vassal must always pay some duty or service to the superior; and if nothing is expressed, a blench-holding is now presumed—formerly it was ward. Where no other tenure was specified in the grant, a ward holding, as the genuine proper feudal holding, was presumed, in so much that a creditor taking landed security for his loan of money by a right of annualrent, according to the fashion of the time, became the soldier and vassal of his own debtor, unless he took care to guard against it by the stipulation of some other payment or service. But if, in a renewal of an investiture, a charter has been renewed without any *reddendo*, it would be presumed this was through inadvertence, and the *reddendo* of the former charter, of which it was a renewal, would be implied in it, unless it was expressly discharged.

in it. It is a well-known rule of law, that, to use the words of Erskine, 2, 3, § 20, ' Charters by progress are, in dubious clauses, to be interpreted agreeably to the original one; and all clauses in the original charter are, in the judgment of law, implied in charters by progress, if there be no express alteration.' He refers to Craig, 2, 12, § 9, who says—' In hac renovatione investituræ hoc præcipue mente tenendum ut, si quid difficultatis oriatur, semper ad primam sit recurrendum; ex primâ argumenta et decisiones sumendæ, licet in secundâ nihil tale reperiatur: nam omnes conditiones et qualitates primæ investituræ censentur in eâ repetitæ, et posterior secundum naturam prioris data censetur et secundum eam intelligenda, licet posterior priorem declarare videatur;' and then he says that this is so much the case, that if there be any change on a renewal of the investiture, unless this be expressly agreed upon, it is supposed to have been '*per errorem et subreptionem impetrata*.' Now, here there is no express alteration, there is merely an omission of any feu-duty for the lands held in feu-farm. I do not think the Crown, after the feudalized grant of the feu-duties to the family of Montrose, could have discharged them. If such a discharge would not have bound a singular successor of the superiority, I think it would not bind a donee under a valid onerous contract, more especially in such circumstances as occur here, where the vassal continued to pay for about eighty years. But, be this

as it may, there is no discharge, no alteration. The charter appears with a *reddendo* for the feu-lands omitted, and this must be supplied from the prior writs. Hence, I see not the slightest necessity for a reduction of the vassal's titles. They do not exclude the right of the feudal proprietor of the feu-duties, which, with possession, is sufficient to support this declarator of his right."

5. LORD MONCREIFF dissented, and observed,—“ I am of opinion that the interlocutor should be adhered to. The lands of Kirkton of Cardross have been held by charter and sasine for nearly eighty years by a blench-holding of the Crown, subject, of course, by these titles, to no feu-duty. I hold that, with such a progress, it is incompetent to look back into any prior titles. The charter 1761 refers to the charter 1707 for the incorporation of the lands into the barony of Ardoch, and the conversion of the holding into taxed ward. But, in a question of prescription, that is not enough to admit any qualification of the title; and least of all of the tenure, by going back to anterior titles. The Statute 1617 excludes all such inquiry. So it is an estate held blench of the Crown, by titles not challenged by reduction. And the basis of the pursuer's claim requires that it shall be converted into a feu-holding, subject to the burden of feu-duties, on an assumption that it had once been held feu, contrary to the standing title by charter and sasine for twice the years of prescription. This

seems to be a plea very dangerous to the law of prescription. The general rule is, that you cannot go back at all, or inquire what was the state of the lands before the date of the charter, or sasines standing together, which form the title of prescription. And to say, that if there be the slightest reference to previous titles, as there must be in all such charters, that will entitle a party to go back and explain away, or alter, or qualify the investiture secured by prescription, is contrary to the very principle of the Statute, which, as I have always understood it, was intended and was effectual to shut out all such inquiries. Therefore it seems to me to be incompetent to assume, or to prove by any prior titles, that the lands in question ever were held in feu under the burden of feu-duties to any superior. The charter and successive sasines, fortified by prescription, establish the title to them as held in free blench. The Crown could not dispute this, or maintain a claim to feu-duties for a moment; and yet the possession founded on is, if it be anything, the possession of the Crown's donator, and no more. The only objection to this prescriptive title is, that there has not been forty years' possession free of the burden here asserted. This is a complete fallacy. There has been constant possession of the lands on a habile title, which is free of all burden. That is what constitutes the prescriptive right. The statement that the possessors did for a time pay feu-duty, because it was asked, is wholly

extraneous, just as any exaction personally complied with might have been. The possession of the lands by such a title, excludes the competency of stating that they were ever held feu, for payment of feu-duty either to the Crown or to any grantee of the Crown. If there be an extraneous claim against the holder of such lands, it must be on other grounds than the assumption of a feu-holding, which, if it ever existed, must be held to be extinguished by positive prescription on the existing titles. It could only rest on some personal responsibility in the defender as representing some parties, who, by their acts, had made themselves liable for annual sums of money levied under that name. There is no pretence for making such a case here. It was said that the defender or his author paid nothing for the change of the holding of *reddendo*. How does that appear? How can it be known? The presumption is, that there was a transaction with the Crown, by which the *reddendo* as for the whole lands was so settled. But my view of the matter is, that there is no competency of looking back to any of the earlier titles, the prescribed title being absolutely free from any such burden. In short, the title by which alone the defender holds his lands being perfectly clear, there is no privy or connexion by the titles between the pursuer and the defender. And therefore it is impossible that the pursuer can, by any title or assignment from the Crown, the only superior, have a right to

draw feu-duties from these blench lands, which the Crown itself could not draw in virtue of any title of superiority, vested in it."

6. Notwithstanding the decided opinion of Lord Moncreiff to the contrary, the judgment of the Court appears to be well founded. The title produced by the defender was certainly a habile title on which to have prescribed immunity from payment of the feu-duties claimed. Two elements, however, are required to constitute a prescriptive right. There must not only be a habile title, but also possession upon that title. If, there-

fore, the defender and his authors had ceased to pay the pursuer and his predecessors the feu-duties claimed, his possession of the lands upon his blench charter from the Crown would have constituted a prescriptive right in his favour. The continued payment of the feu-duties, however, notwithstanding the blench-holding in his Crown-charter, was a possession not in terms of, but in the face of his charter. An important element of prescription was therefore wanting, payment to the Crown's assignee being held equivalent to payment to the Crown.

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*Possession of the Surface, in virtue of a Title to the Lands, without continuous working of the Coal beneath it for forty years, is not sufficient to prescribe a right to the Coal, in competition with an express reservation of the Coal in a prior and preferable Infeftment.*

FORBES v. LIVINGSTONE.

PART of the barony of Haining was feued out by the Earls of Linlithgow and Callendar, in the fifteenth century, to the defender's predecessors, under reservation of the coal. The estates of the Earls of Linlithgow were afterwards forfeited and sold by Parliamentary Commissioners, in 1720, to the York Building Company, whose right was afterwards purchased at a judicial sale by the pursuer's predecessor.

On the forfeiture of the estates of the Earls of Linlithgow in 1715, the defender's predecessors applied to the Barons of Exchequer for a Crown charter of the lands held by him as vassal of the Earl. In 1716 a Crown charter was accordingly granted of the whole lands and pertinents, which he had held as vassal under the Earl, and containing no reservation of the coal, and on this charter sasine followed in 1735.

Nov. 29, 1827.

NARRATIVE.  
See *supra*, page 342.

FORBES  
v.  
LIVINGSTONE.  
1827.

The pursuer's predecessors never attempted to work the coal under the defender's land. In 1756 the coal had been worked by the defender's predecessors to a trifling extent with pick-axes, in a place called Tappuck. These workings, soon after their commencement, had been stopped by the overflowing of water. In 1785 they were resumed, and were carried on for three years, during which time the pursuer's father had got coals from the pits for the supply of his family. About the same time a third set of workings were commenced, and carried on, with short intervals, till about 1796, in the lands of Whiterig, which had been originally feued out separately from the other parcels, but were included along with them in the Crown charter of 1716. The predecessors of the defender had also been in use to insert in the leases granted by them a reservation of their right to dig coal.

In 1809 mutual actions of declarators were brought by the pursuer and defender, for the purpose of having the right to the coal determined. In defence to the pursuer's action the defender pleaded a prescriptive title to exclude. In establishing this title, one of the points raised was the sufficiency of the possession.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—The acts of possession proved were not so continuous in their character as to create a prescriptive possession under the Act 1617. Besides, the possession proved could only affect the particular parcel of lands under which the coal was wrought. The pursuer being infeft in the lands of Haining, which formed part of a single barony, with the coal specially mentioned in his titles, his possession of the surface of any part of the barony was in law an adverse possession of the whole, including the coal, excepting the very parcel of lands to which the working related. Farther, the working of the coal under the lands of Whiterig could not be founded on as establishing a prescriptive title to the other parcels, seeing it was originally a distinct and separate feu.

ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—The acts of possession were as continuous as the nature of the subject required, and had extended over a period of more than forty years in the know-

ledge of the pursuer's predecessors, without any attempt at interruption on their part. All the parcels of land excepting Whiterig were obtained from the Earls of Callendar by one feu-right, and all, including Whiterig, were contained in the Crown charter of 1716. Possession of the coal on any part was possession of the whole, and could not be affected by the constructive possession of the pursuer's ancestors of the surface of the reserved part of the barony. Although the parcel of lands called Whiterig was obtained originally from the Earls of Callendar as a separate feu, by being included with the others in one Crown charter, the whole parcels formed one subject, and the possession of the coal under Whiterig must be considered as affecting the whole subject.

FORBES  
v.  
LIVINGSTONE.  
1827.

In consequence of a Remit from the House of Lords, the whole Judges were consulted, and the Court Found, "That the defender has not proved sufficient possession, by working coal either in the lands of Tappuck or in the lands of Whiterig, to establish a right by prescription to the coal in either of these lands; and further find, that possession of the coal situated in the lands of Tappuck, or in the lands of Whiterig, could not support a prescriptive right to the coal in the other of these lands respectively."

JUDGMENT.  
Nov. 29, 1827.

LORD PRESIDENT HOPE, LORDS GILLIES, MACKENZIE, ELGIN, and MEDWYN.—"It is now to be inquired into, whether Mr. Livingstone has proved such acts of possession of the coal as are sufficient to support a right to the subject by the positive prescription? And here it is first to be considered, Whether the possession of the coal of each parcel of land is to be regarded separately with a view to prescription of the coal of that parcel only, or is the possession of both to be taken together, with a view to prescribe a right to the coal in both parcels as one whole?"

OPINIONS OF  
THE CONSULTED  
JUDGES.

"It appears that in 1647 a feu-right was granted to Mr. Livingstone's predecessor of the lands of Nicoltoun, Weitshot, Hillhead, Gilmeadowland, and Parkhall, and in 1681 another feu-right was granted of the lands of Whiterig. Though now included in the same charter, they are still granted as separate and distinct subjects; first, the lands of Nicoltoun,

FORBES  
v.  
LIVINGSTONE.  
1827.

&c., with the pertinents ; then are interposed the lands of Rowantreeyards, the subject of another feu-right in 1713 ; and then follow the lands of Whiterig, with the pertinents. It is true, in the *reddendo* these lands had been joined together : ‘ Reddendo pro dict. terris de Parkhall et aliis, Rowantreeyards et Whiterig, unam albam plumam apud terminum Pentecostes annuatim, nomine albæ firmæ, si petatur tantum.’ But this is of no consequence, as the *reddendo* is altogether elusory. Under these circumstances, we are of opinion that the possession of the coal under these two parcels of land cannot be thrown together, in order to prescribe a right to the coal under each. If the lands had still been conveyed under separate charters, there can be no doubt that the coal within each charter could have been prescribed by possession of that portion of the coal only ; and we do not think the including of both grants in one deed can make any difference, when the two parcels of lands are still kept separate and distinct, each being conveyed with its own pertinents. It still remains as obvious as before, that it might be the understanding of the parties that the coal was conveyed as to one, while there might be just the opposite understanding as to the other ; and so there might be possession of the coal of the one parcel taken and allowed, while possession of the coal of the other was neither taken, nor desired to be taken, nor would have been allowed to be taken. If that be true, it seems impossible to say, that possession of the coal of one parcel only of the lands for forty years would found a prescriptive title to both ; otherwise it must be held that a party might lose the coal of an estate which he was carefully watching to prevent any workings upon it, holding his right to that coal to be clear, because he allowed the coal of another estate to be taken, to which he did not think his right to be clear, and this merely because, though separate estates, they were included in the same charter, with one nominal *reddendo* for both. It is no doubt true that there may be prescription of the whole coal under one individual estate, by the possession of a part, for instance, a working by one or two pits only. This arises from the nature of the subject, which does not admit of full occupation of the whole at once, as the surface of the ground does by tillage or pasturage ; and if one



part of a coal is possessed, there can be no reason to doubt that the possessor thereby pretends and exercises right to the whole,—the whole granted by the same words as one subject, and the right to all and every part being identical and inseparable. But this cannot apply when two parcels of land are granted as separate subjects, although the two grants be included, for convenience, in one charter.

FORBES  
v.  
LIVINGSTONE.  
1827.

“ After all, this point may not be thought very material in the determination of the present case ; for, even taking all the possession together as applicable to one coal, we do not think that it amounts to sufficient possession to support a right to the coal by the positive prescription. There is a failure in the continuousness of the possession, which is necessary for prescription. Here we must not regard the possession of the surface of the land ; for when coal is claimed in virtue of an infetment not specially conveying the coal, but the lands generally, without any reservation of the coal, in competition with an express reservation of coal in prior, and in themselves preferable infetments in favour of another party, the possession founded on for prescription must be that of the coal itself. But while we, on the one hand, disregard the possession of the surface, on the other, we are to consider the nature of the subject, the coal, and the kind of possession which it admits of. Possession for every day during the forty years, nor even for every year, cannot be required ; but there must be such a possession by working the coal, as must, or in reason ought, to have kept up in both parties all along during the prescriptive period the impression that the coal was in the possession of the party pleading prescription. Now we cannot hold that there was any such possession here.

“ We need not minutely go into the proof, because, unless the workings at Tappuck in 1785, which lasted only for three years after coming to the coal, and at Whiterig in 1787, which continued for a period not much longer, (after which in neither place have they since been resumed,) can be held as continuations of the first workings by Mr. Livingstone’s predecessor in 1756, they cannot possibly afford a ground for possession, such as would be necessary for a prescriptive right of coal. Any workings before 1756, of which there are obscure

FORBES  
v.  
LIVINGSTONE.  
1827.

indications in the proof, must be laid out of view, as it is not shewn whose operations these were, and whether they were not workings by the family of Callendar under their reserved right. As to the workings in 1756, they were extremely trifling, and only for a few months, and not resumed for twenty-nine years afterwards. It is impossible, we think, to hold that, during so long an interval, the effect of the possession, so very transient in itself, could continue, or that the true proprietor could have doubted, during the latter part of the period, that the intruder had given up all claim to the coal, and that his reserved right to it was unchallenged by the other. In the twenty-eighth or twenty-ninth year after the working ceased, without any attempt to resume it, it seems impossible to hold that the true proprietor was bound to consider the other party as in possession of the coal, and that he was bound to take legal measures to remove him, or to interrupt prescription; nor if such had been instituted, could the other party have defended himself as being entitled to a possessory judgment. This, we think, would have been impossible. The interval was so long, that the effect of the short possession of the coal by Mr. Livingstone's predecessor had ceased, and thus there was an end of that continuousness of possession necessary for the positive prescription. It is said that the resumption of possession after the interval must draw back and help to cover this interval. We think not, and that the interval is greatly too long, during which possession ceased, to ascribe any such effect to it. No doubt, if the interval in such a case were very short, or at least so short as to leave it doubtful with whom the possession should be understood to have been, the after-possession, without objection, might afford evidence of what was the understanding of the parties all along, and the effect would draw back; but here, after so long an interval, the after-working can be looked on only as a new assumption of possession, the effect of the former in the question of possession being entirely gone. If so, the workings for the few years in 1785 and 1787 are quite insufficient to support a plea of prescriptive possession, in opposition to the right in Mr. Forbes as proprietor of the barony of Haining to the coal in question."

LORDS BALGRAY, MEADOWBANK, and NEWTON.—"We are

quite clear that, as a prescriptive title of the nature of that founded on requires, in all cases, to be accompanied with actual, fair, and open possession, continued, uninterrupted, and undisturbed, the possession which is here proved to have taken place is totally insufficient and inadequate to support that founded on by the defender. But, as this part of our opinion rests on the same grounds as those stated by the other Judges who are for repelling the defences, we deem it unnecessary to enter into that part of the case, which has been so fully stated in the judgment delivered by them."

FORBES  
v.  
LIVINGSTONE.  
1827.

At the Advising LORD PITMILLY observed,—“ We next come to consider if there be sufficient possession. This divides into two points. 1. As to the acts on Tappuck and Whiterig, I also agree, that they can only affect right as to specific lands themselves. Then, 2. Whether possession as to Tappuck having suffered cessation of thirty years is sufficient ; and I am satisfied that it is not sufficient even as to Tappuck. And therefore, on the whole, although I hold Mr. Livingstone to have a sufficient title, yet I think he has not had sufficient possession.”

OPINIONS.

LORD ALLOWAY.—“ The precarious and uncertain possession in 1765 could not make a ground of prescription, unless connected with other strong acts. No doubt there was a strong act in 1785, but that will not do unless it could be connected with the prior acts, and I agree on this with the other Judges.”

LORD GLENLEE.—“ It is impossible to conjoin the old possession with Mr. Livingstone’s title ; if that could have been done, it would have been a very different case, and that was the case of Lady Mary Lindesay Craufurd. But as I cannot do that, I conceive that there is no sufficient prescriptive possession proved. There is one thing, however, in the opinion of the President, &c., as to which I doubt, viz., whether the possession in the case of Tappuck would not affect the other lands. It is quite unnecessary to decide this, but still the lands, though separately described, being in the same charter and precept, and having one *reddendo*, I incline to think, makes them one tenement, although I would rather be understood to give no opinion on that.”

LORD JUSTICE-CLERK BOYLE.—“ As to the possession, no

FORBES  
v.  
LIVINGSTONE.  
1827.

doubt it could not be required to have been *die in diem* for the forty years, but it must be that regular, continuous, and open possession, which shews the party exercising his right openly, so as to lead parties entitled to object to challenge it. Now the working of two men only with picks, and turning out a few coals for a short time, cannot be said to have established a colliery, and that is one great difference from the cases of Lady Mary Lindesay Craufurd; and besides, this partial working was interrupted by thirty years' cessation, and therefore is not at all that continuous possession necessary to establish prescription, and it is not connected in any way with any previous workings. I have come also to be of opinion, that we cannot hold the workings in Tappuck to assist those in Whiterig. I cannot leave out of sight that the case of Whiterig stands on a different feu-contract prior to the application for the benefit of the Clan Act. If I saw evidence that the same field of coal and pits, though on different lands, had been worked, I might have connected them; but as it stands I cannot. I am satisfied, however, that, whether taking them together or separately, there is not sufficient possession to support the title of prescription, which does exist in the person of Mr. Livingstone."

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*A single act of Presentation under a title to a Patronage is not sufficient to constitute prescriptive possession.*

MACDONELL v. THE DUKE OF GORDON.

Feb. 26, 1828. THE pursuer, in right of Campbell of Ardchattan, claimed the patronage of the church of Kilmainvaig, in virtue of a grant to the family of Ardchattan from James VI. in 1602, on which infestment followed in 1606.

NARRATIVE.  
See *supra*, page 320.

The defender claimed right to the same patronage in virtue of a grant from James VI. in 1618, on which infestment followed in 1623.

In 1775 the Duke of Gordon granted a presentation in favour of Mr. Ross, which was sustained by the Presbytery, and

in virtue of it the presentee was settled in the parish. In 1788 his Grace, as patron and titular of the parish, gave in a scheme of locality, in a process of augmentation brought by the Duke's presentee, Mr. Ross, and claimed an exemption of his own teinds, as those of the other heritors were not exhausted. Appearance was made for Campbell of Ardchattan, who asserted the same right, and also for the Officers of State, who objected that neither party had produced any titles to the patronage. The Lord Ordinary ordained the Duke and Ardchattan to produce their respective titles, and this order was renewed in 1790. In 1791 a locality was lodged by the Officers of State, allocating part of the stipend upon the Duke, and the titles of both parties were then produced. The locality, with consent of the Duke, was approved of as an interim one, until the disputes between his Grace and Ardchattan should be settled, but under a protest by his Grace that it should not affect his right of patronage.

MACDONELL  
OF  
DUKE OF  
GORDON.  
1828.

Two other augmentations were brought by Mr. Ross,—one in 1799, and the other in 1813, in both of which interim localities were approved of under the same circumstances, and under these localities both parties paid stipend like the other heritors.

In 1822 Mr. Ross died, after having been upwards of forty years incumbent of the parish, in virtue of the presentation granted by the Duke in his favour in 1775.

In consequence of different presentations having been granted, the one by the pursuer, and the other by the defender, mutual actions of declarator were brought for the purpose of having their rights determined. In defence to the pursuer's action, the Duke, in virtue of his Crown charter of 1618, and his possession under it, by presenting to the parish in 1775, pleaded a prescriptive title to exclude.

PLEADED FOR THE PURSUER.—In order to acquire a prescriptive right there must be a continuous possession. In this case the only act of possession on which the Duke could found was that of the presentation of Mr. Ross. As that was only one act, and as that person, from the moment of his induction, possessed independently of any right held by the Duke, and in virtue of the ecclesiastical law, it is impossible that that single

ARGUMENT FOR  
PURSUER.

MACDONELL  
v.  
DUKE OF  
GORDON.  
1828.

act of presentation can be regarded as continuous possession. Even supposing a single act could create continuous possession, still the possession must be peaceable and uninterrupted ; but it had been interrupted by the proceedings in the localities, and the payments made by the Duke under the schemes of locality.

ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—As the defender has an *ex facie* good title, it is effectual to found a plea of prescription, provided he has had the possession required by law. The only possession which was requisite, was that which the subject would admit of. The right of patronage is not of a nature to admit of actual possession *de momento in momentum*. It is sufficient, therefore, if a presentee, who has derived right from the party claiming the patronage, has been in possession, without interruption, for forty years. This has taken place in this case. There has been no interruption ; because, *first*, the concessions in the localities were made merely with a view to the accommodation of the clergyman, and not as admitting the right of Glengarry ; and, *second*, because the right claimed was that of titular, and not of patron, which are essentially distinct ; and, therefore, in so far as regarded the enjoyment of the patronage, there has not been the slightest interruption.

A hearing in presence was ordered before the whole Court.

JUDGMENT.  
Feb. 26, 1828.

The Court, in the action at the instance of the pursuer, “ Decerned in terms of the libel,” and in that at the instance of the Duke, “ Sustained the defences.”

OPINIONS.

LORD JUSTICE-CLERK BOYLE.—“ The title to the patronage in the Duke of Gordon is clear. It is equally clear that he exercised his right ; for in 1775 he presented to the church the person who remained incumbent for a period of forty-seven years. The question then is, Whether the Duke’s right is not established by the positive prescription ? Although I am quite sensible of the objections that have been taken to his non-exercise of the other rights which belong to the patronage, and all the proceedings which took place in the different localities, yet I am

bound to consider the situation in which the Duke of Gordon stood in regard to the titularity. He was patron, but he was not titular. Now I have not been able to arrive at the conclusion that the positive prescription does not apply to this case, so as to fortify the Duke of Gordon's title. We have here the exercise of the right upon an undoubted title. Possession under that act continued for a period of forty-seven years, without any interruption to disturb the Duke's title. There was no process instituted—there was no declarator raised by Glengarry or Ardochattan—there was nothing done by the adverse party during all that time; and therefore I think we cannot give effect to the doctrine of prescription, if we do not sustain the Duke's title.

MACDONELL  
v.  
DUKE OF  
GORDON.  
—  
1828.

“I do not know what number of presentations or other circumstances might be required to establish a prescriptive possession; but in this case there was no attempt on the part of Glengarry to establish his right. I am clearly of opinion that Glengarry was perfectly entitled to have brought a declarator to have it found that the right of patronage was in him, which, if he succeeded, would have been an effectual establishment of his right, and an effectual interruption to the Duke of Gordon. But he did not take any such step, nor did anything to establish his right; and therefore I think the Duke of Gordon's title is now fortified by the positive prescription.”

LORD GLENLEE.—“The question here is, Whether there has been continuous possession? The Statute requires two or more sasines standing together. It appears to me impossible that one act of presentation can be regarded as continuous possession.”

LORD CRINGLETIE.—“A right of patronage is an anomalous right, so far at least as the right of presenting goes. When it is once exercised, and after the incumbent is inducted, there is no disturbing him, whatever may become of the right of the patron. It is like the right of the champion at the King's coronation. After a person has appeared in that character once, and there should be no coronation again for forty years, (as was the case on the last coronation,) could the champion plead, from his having done it once, an exclusion of any investigation into the rights of another to fill that office?”

“So in the case of an incumbent, he cannot be disturbed

MACDONELL  
v.  
DUKE OF  
GORDON.  
1828.

after he is once settled there. Even in the case of disputed patronage and double presentations, if one has been inducted, and the right should afterwards be found to be in the patron of the other, the only effect might be to give that other the right to the stipend ; but if the one that was inducted chooses notwithstanding to possess, he is entitled to do so.

“ It is therefore an anomalous right ; and it is difficult to say that one act would be sufficient, because the minister lives above forty years. There must be continued possession. One single act is not continued possession. Now, when you look to the case, what happens ? You see there is a locality brought, just fourteen years after the presentation is given. In that locality the Duke of Gordon appears as patron, and is opposed by Ardchattan. The Duke of Gordon gives in a locality, and this is one of the rights which belong to a patron ; but Ardchattan appears, and opposes his right of patronage. Lord Swinton ordained both parties to produce their titles, in order that the question of right might be ascertained. The question of right might have been tried in that action. The question, who had a right to give in the locality, would have tried it ; but both parties gave in to each other, both reserving their claims, and allowed the minister to get his interim locality. This is done, and the interim locality goes out. The same thing happened in the other two localities, in which the patronage was always disputed. So that we have here a patronage actually disputed, and the right called in question in a solemn and regular way ; but the discussion was dispensed with at the time, merely because the interest of the clergyman was in question,—but both parties reserving to themselves to fight it out afterwards.

“ Can it be said that now, when you have a solemn action brought to try that question, the rights of the one party are not to be judged of, because of the possession of the other proceeding upon one act, and the right actually disputed ? The Duke of Gordon had an opportunity of getting his right ascertained, but he declined doing so, and only reserved his right.”

LORD COREHOUSE.—“ I consider this an important question as it affects the law of prescription, and I am not aware that it has hitherto received the decision of the Court. It is desirable



that we should be able to refer it to a general principle, and see how that principle squares with the authorities.

“ The material facts established by evidence are these :— There was a complete feudal title to the patronage in Ardchattan, which is now by progress in Macdonell of Glengarry, whose predecessors had previously acquired a personal right. The Duke of Gordon has also produced a grant, but posterior to that of Ardchattan ; consequently Ardchattan’s was originally preferable. There is evidence of some possession on the part of Ardchattan, or rather his personal disponent Glengarry, before 1750. I do not think that material. Neither Ardchattan nor Glengarry has had any possession since that period. The Duke of Gordon has proved one decided act of possession, by presenting in 1775. I do not think he has proved any other act of possession. I lay out of view the proceedings in the localities, because they relate only to the titularity, which may be acquired or lost independently of the patronage ; and because they never amounted to possession, but only to a claim of right pleaded, but not admitted or acted upon.

“ What is the legal inference deducible from these facts ? It appears to me, *First*, That the Duke of Gordon has failed to show that he acquired right to the patronage by the positive prescription ;—*Secondly*, That Glengarry’s right is neither lost, nor capable of being lost, by the negative prescription ; and consequently that Glengarry’s right, being originally prior and preferable, must still be preferred.

“ Has the Duke of Gordon acquired the right by the positive prescription ; that is, has he, in terms of the Statute 1617, possessed this patronage forty years continually and together since the date of his infeftment ? I think he has not. It is evident there can be no continued natural possession of a patronage ; for it is settled law that the patron cannot present himself, (*Bankton*, ii. 32 ; *Connell on the Law of Parishes*, v. 20.) He cannot therefore enjoy the fruits, or do the duties of the office, *qua* patron. It is equally clear that there can be no continued civil possession, at least in the sense contended for by the Duke of Gordon—that is, through the presentee ; for the right of the presentee is independent of that of the patron, and would subsist, although that of the patron were reduced. What

MACDONELL  
v.  
DUKE OF  
GORDON.  
1828.

MACDONELL  
v.  
DUKE OF  
GORDON.  
1828.

then does constitute continuous possession in patronage? I conceive that it stands on the same footing with a numerous class of rights which, from their nature, can be exercised only at intervals—as a right to a burial-place—to carry the crown at the coronation—to be champion—the royal standard-bearer—the royal carver—and so forth; all of which are heritable rights, capable of being acquired by prescription. It is proper to mention, that I lay out of view, in the case of patronage, the right of disposing of vacant stipends—of having a seat in the church—and certain other privileges which may admit of constant possession, because they are only incidental, and do not exist in many cases. For instance, in this case there was no vacant stipend for fifty years, and the patron has no seat in the church. I am considering patronage as confined to presentation alone.

“To constitute possession in all this class of rights, I conceive there must be two or more acts, with a distinct interval between them. This infers continuance of possession *animo* during the interval, on the principle *probatis extremis præsumuntur media*. That presumption may yield to a contrary presumption; if opportunities occur of exercising the right during the interval, and are neglected, the animus is supposed to be gone, the continuity is broken, even though there should be no competitor to interrupt. Thus, in a patronage, if one should present twice at the distance of thirty years, his possession is continued *animo* during those thirty years by force of the presumption *probatis extremis*, &c.; but if there had been a vacancy in the interval, and he has neglected to present, there is no room for the presumption. This seems to be the import of Lord Stair’s doctrine. ‘The other consideration of prescription is as it establisheth and completeth a right by forty years’ possession uninterrupted; and being so proponed, the possession must be proved to have been so long; and although it be not proved to have continued every quarter, month, or year, yet ordinary possession will be sufficient *ad victoriam causæ*, albeit it be proponed in the terms of continued possession, *quia probatis extremis præsumuntur media*.’—Stair, 699. He touches again on the subject, p. 734.

“I am aware it may be said, that to constitute prescription

in that way, the acts of possession ought to embrace a period of forty years ; in other words, that the extreme points must be proved, which would not be the case, if one were to present twice only at the interval of thirty or thirty-five years. But when the claimant has established himself in a state of continuous possession, it is no stretch to hold that that state remains until it be changed by the interruption of another party, or by his own neglect. This is very different from holding, that because he has performed one momentary act, perhaps through ignorance or inadvertency, he must, on that account, be presumed to be in possession *animo* for the next forty years.

“ By granting that patronage may be acquired by the positive prescription, it is said you also grant that it may be acquired by that possession which the nature of the right admits, and that in this case there was no opportunity of presenting or exercising any other unequivocal act of patronage for forty years after the presentation of 1775. The fallacy here is obvious. Patronage is a prescriptible right, because, in the ordinary case, it admits of a proof of continuous possession *animo* ; but it does not follow, that in every case the lapse of forty years from the date of the grant shall complete the prescription. There may be no opportunity of exercising any one act during that period—nay, for fifty, or even sixty years. It will not be maintained that there can be possession of a patronage without the performance of any one act as patron ; and if the want of possession altogether be fatal to the establishment of the prescriptive right, the want of continuous possession is equally fatal.

“ The literal construction of the Statute 1617 is manifestly on this side of the question ; but it is the fair and reasonable construction also. It would be hard, as Erskine remarks, to make a single act of negligence forfeit the true owner of his right. It may never have come to his ears—he may have been out of the country—he may have taken it for granted that the Presbytery supplied the vacancy *jure devoluto*. It is true that the positive prescription does not rest on the presumed negligence of the party against whom it is pleaded. Its object is to secure peaceable possession against antiquated and forgotten claims. We feel it a hardship that a person should be

MACDONELL  
v.  
DUKE OF  
GORDON.  
1828.

MACDONELL  
v.  
DUKE OF  
GORDON.  
1828.

turned out of his estate after being connected with it, and after enjoying it so long; although another had originally a better title, and although no blame is imputable to him for omitting to assert that title. But our sympathy cannot extend to one whose whole connexion with the estate, and whole enjoyment of it, consist of a solitary and momentary act performed forty or fifty years before. The application of the positive prescription to that case would be repugnant to the feelings and principles by which it was introduced and sanctioned in other cases.

“ In forming this opinion, I am moved by the authority of our institutional writers, which, in the absence of decided cases, is the safest ground on which we can proceed. Lord Stair, in the passages which I have quoted, lays down the general principle. With regard to the particular case of patronage, he states only that it may be acquired by the positive prescription, as to which all are agreed. In the next place, Sir George Mackenzie may be referred to as an authority, and who, I think, has been too little attended to on both sides of the Bar. He is not treating of prescription, but of possession; but possession is the only element of prescription with which we have any connexion at present. He puts the case of one competitor claiming an exclusive right of patronage, and another competitor or competitors claiming a joint right; and the question he puts is, What shall be held possession of the exclusive right, so as to entitle that claimant to a possessory judgment? One act of possession is evidently not enough; for that is consistent with the claim of his competitor, who only demands to present in his turn. Suppose there are two consecutive acts—is that enough? That is inconsistent with a claim of alternate presentation; because it is one act of possession in the character of exclusive patron; but that one act is not held continuous possession, so as to entitle the claimant to a possessory judgment. There must be two acts performed in that character to create continuity; and hence the doctrine of *trina vice*, which Sir George Mackenzie, and afterwards Mr. Forbes, lays down as the law of Scotland in a competition of that nature—namely, between one claiming the exclusive right, and the other the alternate right of presenting.

“ Mr. Erskine, the last and best of our institutional writers, delivers an express opinion on this point, which, I confess, would be decisive with me, were there nothing else in the case. It is said he wrote before the decision in the House of Lords in the case of the Earl of Home. That might have been material, if the decision had been inconsistent with what Mr. Erskine has stated ; but his opinion is exactly the same with that of the House of Lords—namely, that the positive prescription does apply to patronage ; and that possession is proved by repeated acts.

MACDONELL  
v.  
DUKE OF  
GORDON.  
1828.

“ Bankton (2. 8. 92), as he usually does in cases of nicety, gives both opinions, that his reader may choose for himself. In this instance, indeed, after balancing them, he throws certain texts of the canon law, and the authority of one Covarinus, into the scale, in favour of a single act of presentation. The texts of the canon law, which, by the way, are misquoted on the margin of his book, do not support the opinion for which he refers to them. They apply to the case of the negative prescription. If the Ordinary—that is, the Bishop, or he having the exercise of the Episcopal function—which in Scotland corresponds to the Presbytery—has presented, and forty years elapsed during which no patron makes a claim, the patron ever after is barred by his negligence ; but in all cases of competition for a patronage, whether between laic or ecclesiastical patrons, continuous possession, in virtue of repeated presentations, is necessary by the canon law to constitute a prescriptive right. I refer to Denisart, an author in the hands of everybody. ‘ Patronage is acquired by prescription, when the Ordinary has presented freely during a certain period, without any presentation being lodged by a patron. On this you will remark, that laics and ecclesiastics may also acquire the right of patronage by possession ; but, with regard to them, it is necessary that it shall endure at least for forty years, and that in this interval there shall have been several presentations and provisions.’

“ Thus Bankton, the only one of our law writers who has expressed a doubt on the subject, has been misled by mistaking the import of the canon law. On these grounds, I am of opinion that the Duke of Gordon has not acquired this patronage by the positive prescription.”

MACDONELL  
v.  
DUKE OF  
GORDON.  
1828.

LORD BALGRAY.—“ I take a very different view of the principles of the law of Scotland. My opinion agrees with the opinion that was first delivered.

“ This is the interpretation of a pure feudal right created by charter and sasine, and we must all agree in opinion that the right of patronage may be so conveyed. The question is, Whether there is a title, and whether there has been possession? It all turns upon the positive prescription. When I look at the Act 1617, and the manner in which that Act has been applied, I am driven to the necessity of inquiring, what was the possession which was in the view of that Statute?

“ The question is, Whether that possession arises from the case of a presentation, which is the only way the right can be exercised? as the other rights belonging to the patron are mere adventitious rights, and are quite independent of the feudal right created by the law of Scotland.

“ I am not going back to commentators and to the canon law; I must just look to the solid principles of common sense.

“ The misfortune here is this, that the exercise of this right depends entirely on a *punctum temporis*. Every act of possession depends upon a *punctum temporis* of itself, and it would in this way require forty presentations to create the right. If one act of presentation will not do, and you are driven from that, how many acts are you to have? Will two do? There is no principle for that. All that this would do would be merely to create a presumption of continued possession, it would do no more. On these grounds, I cannot see that you can adopt any other mode than holding one act of presentation, followed by forty years' possession under it, sufficient. It was the duty of the other party to have interrupted the possession, and it was competent for him to do so.

“ As to the localities and the alleged interruption in these processes, these were for a very different purpose. It was the titular who had the right; but the Duke of Gordon was not titular, and in truth had no right to interfere; and, therefore, in waiving his right in these localities, he in fact was waiving nothing—he waived no right at all.

“ I therefore agree with the opinion first delivered; and if you

adopt any other rule, you adopt a most arbitrary one, founded upon the canon law."

MACDONELL  
C.  
DUKE OF  
GORDON.  
1828.

LORD ALLOWAY.—"I entirely agree with what has been so well said by Lord Corehouse. The only author who has expressed a doubt upon this subject is Lord Bankton, and he has referred to authorities; but Lord Corehouse has shewn that Lord Bankton was wrong, and that he was mistaken in the references which he made. We have Stair, the most profound of all our institutional writers, as well as other authorities.

"In many feudal rights it has been the subject of contention, whether possession had taken place on them or not. A question of this kind occurred very lately, but has not been alluded to in these papers. In the case of *Livingstone v. Forbes*, the question was this—In the first place, whether prescriptive possession could take place where, from the *quæquidem* clause in the charter, it was found that they were founding on a title totally null? You were unanimous that the plea of prescription did apply, but you considered that there was no evidence of continued possession in terms of the Act of Parliament. In that case there was one act of possession by the working of coal, and there was another about twenty years afterwards; but, notwithstanding of these two distinct acts of possession, you did not consider that sufficient continued possession.

"Is it possible, when you so determined a case of that kind as to the common rights of property, the right of working coal, that you can hold in this case that one act of possession is sufficient? and that at a time when the opposing family was so unfortunate, as that the estate had been under judicial sale. Suppose Glengarry had been abroad, and in the mean time the presentation had gone out, and the presentee inducted: Could you say that, from this single act, you must pronounce a judgment excluding Glengarry's right? It is impossible for me to conceive that one single act not followed by possession, because there could be no possession, can be held sufficient in this case. I think it would be contrary to the Act of Parliament, and to all our authorities."

LORD PRESIDENT HOPE.—"In the opinion which I have formed on this case, I agree with Lord Balgray. I think that the title of the Duke of Gordon is fortified by the positive pre-

MACDONELL  
v.  
DUKE OF  
GORDON.  
1828.

scription ; and, notwithstanding of what has been said by some of your Lordships, I am also of opinion that Glengarry's right is cut off by the negative prescription. There is here an unquestionable feudal title. Both these parties had the right of patronage in their titles fortified by sasine ; so that the whole question turns upon possession.

“ After hearing from your Lordships—what is undoubtedly the case—that you must apply the doctrine of prescription according to the nature of the thing to be possessed—that you are to give to the possession the weight due to it, considering the nature of the subject to be possessed—I say, after hearing this doctrine so broadly laid down by your Lordships, I was somewhat surprised that that doctrine was not to be applied to the case of patronage. The possession in that case, as has been stated by Lord Balgray, is a possession depending upon a *punctum temporis*. The exercise of this right can only be occasional, by the patron enjoying possession by the presentee. Lord Corehouse has said that there can be no natural possession in the case of patronage ; but I have known the contrary. In the case of Mr. Dalgleish of Scotsraig, he was patron of a church in Fife, and he presented himself ; so that if there came to be a question of prescription, how could you separate the possession of the church from the possession of the estate ? Could you draw the distinction between the possession of the patronage by a third party, and the incumbent himself ?

“ But what sort of possession in many cases can there be ? Take the possession of a liferenter and fiar. My estate is possessed by a liferenter for forty years, during all which time I have no possession. Natural possession I have none ; civil possession I have none, unless my possession be through the liferenter. But the law holds that the person who has possession under me has my possession. In the case of patronage, how can there be possession in any case but by means of the presentee ? Is the right in my title to depend on the contingent right of third parties possessing under me, over which I have no control ? One man possesses by his presentee for forty years ; that is not good ; but if the presentee dies in twenty years, and the patron presents again, then this will establish his right. Can there be any principle for saying that



the validity of feudal rights is to depend on such contingencies? How would this do in the case of superiority? I have certain lands in my charter, and I grant a feu-right. My vassal possesses for forty years; the lands are in my title-deeds; and will my title be worse by one vassal surviving for forty years, than if the vassal had been charged once or twice during that period? Lord Glenlee mentioned that the Act speaks of sasines, one or more, standing together, and that this implies that there must be more than one sasine. But that is not the case. Where there are more sasines than one, then they must be standing together. If there is any intervening sasine, then it will cut off the contiguity of possession. But where there is only one sasine for forty years, that will be quite sufficient. The meaning of the Act is, that if there be more than one sasine, then they must be immediately following one another. If I have a sasine upon a retour, with forty years' possession, it is sufficient.

MACDONELL  
v.  
DUKE OF  
GORDON.  
1828.

“ But I come back to this, that if you are to apply the law of patronage, you must apply it according to the nature of the right. By presenting, I have done all that I could do. The presentee is in my possession, only in virtue of my right. If a challenge is brought of the patron's right, even within forty years of the presentation—if the presentee is inducted, he continues in possession. A man may be presented by a person who has no right whatever to the patronage; but if he is inducted by the Presbytery you cannot turn him out. This, however, is by force of the ecclesiastical law, which is quite separate from the common law of the land. But it is said, to what purpose could the other party have brought a declarator for having his right ascertained? That would have been merely for the purpose of interrupting. I agree that, where nothing is to be gained, an action of declarator is not good. But here he might have got the right of patronage ascertained in his favour; and when the next vacancy occurred, having the right of patronage, he might immediately present, without waiting for a competition, or keeping the parish vacant for six or eight years, as has been done in this case. Therefore a great deal was to be done by a declarator.”

LORD MACKENZIE.—“ The opinion I entertain in this case is

MACDONELL  
v.  
DUKE OF  
GORDON.  
1828.

precisely the same as that which has been expressed by Lord Corehouse. On one point I should perhaps be inclined to go a little further. Suppose there were two acts of possession, both within a short period of each other, I should hesitate in admitting the rule as laid down by his Lordship. I should rather think it was necessary to have two acts of possession—one at the termination, or after the termination, of the forty years. I think this may be inferred from the terms of the Statute. If I could suppose that the possession of the presentee was the possession of the patron, I could then go along with the opinion expressed by your Lordship; but, not being able to adopt that view of the case, I cannot come to that conclusion. I think it is the same as if an enemy had entered the country, and never allowed the incumbent to take possession at all. To return to the question, whether one act of possession is sufficient, I think it stretches to its greatest length when we say that the right may be acquired by two acts of possession; but I cannot go further.”

LORD GILLIES.—“The difficulty that arises here is, that the possession of the clergyman is not the possession of the patron. In the case of a superior and vassal that difficulty does not arise, because the possession of the vassal is the possession of the superior; he holds his rights from him, and is dependent upon him. But here the possession of the incumbent has nothing to do with the right of the patron. From the moment he is inducted, he is independent of the patron altogether, and might continue in the charge, although the patron’s right was set aside. I do not think the case of Forbes of Callendar has anything to do with the present question. The subject there was one which admitted of direct and continued possession. But here the subject does not admit of that continued possession; it can only be possessed at intervals. When I saw it stated in these papers that one act of possession might not be sufficient, but that two acts of possession might, I had great difficulty in entertaining such a doctrine, because I could not find out any principle for it. But I must own that Lord Corehouse has pointed out a principle which appears to me to regulate this case. What the Act of Parliament requires, is not possession, but continued possession. But if there can be

two acts of possession exercised, whatever may be the interval between them, then you have continued possession ; and if you have once continued possession, then that must be carried through the whole period till the right is challenged. That is the short view I take of this case—that one act of possession is not sufficient under the Act of Parliament. His Lordship then pointed out the distinction between the case where there was only one act of possession, and where there were two or more acts of possession. In the latter case you have, but in the former you have not, the continued possession which the Act requires. I think the two acts are just as good as twenty, and I do not think it is of any consequence what the length of the interval between these acts of possession may be.”

LORD MEADOWBANK.—“ I concur in the opinion given by Lord Balgray.”

LORD CRAIGIE.—“ I am of opinion that a single act of presentation is not sufficient to cut out a prior right of patronage. In such a case as the present, the right of patronage and titularity form one and the same estate. It is necessary, therefore, that a full, continued, and uninterrupted possession of the whole, as far as possession is practicable, should be proved. But here there is no possession whatever following on either patronage or titularity, except the single act of presentation ; although, even as to the patronage, there might have been other acts of possession by the disposal of the vacant stipend, enjoying a seat in the church,” &c.

LORD NEWTON.—“ If I were completely satisfied that the possession of the incumbent was not the possession of the patron, I should have difficulty in this case. But I think the patron may be said to possess by the presentee, so long as the right of the patron is not called in question. Another may have a better right ; but that is just an additional ground for inferring possession, if that party does not come forward and claim his right. If a challenge is brought of the patron’s right, or a declarator is brought for having it found that the right is in another, then the possession of the incumbent may be said to be restricted to the right arising from his induction. It would put an end to the possession which the patron is entitled to claim from the possession of the incumbent ; but

MACDONELL  
v.  
DUKE OF  
GORDON.  
1828. .

MACDONELL  
v.  
DUKE OF  
GORDON.  
1828.

where there is no challenge of his right, I think he is entitled to found on the incumbent's possession as his own, and in this way I think there can be only continued possession under the Statute.

"I do not think it is of any consequence as to what took place in the several localities. Everything there was done in the character of titular, and all that was waived on these occasions was what regarded the rights of the titular alone."

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*Possession upon a Charter of Adjudication for forty years from the expiry of the legal vests an absolute right of property in the Adjudger, without a declarator of the expiry of the legal.*

I.—GEDD v. BAKER.

Dec. 5, 1740. This case is given in Volume I. page 200.

II.—CUTLER v. McLELLAN.

Dec. 9, 1762. This case is given in Volume I. page 204.

III.—CAITCHEON v. RAMSAY.

Jan. 22, 1791. This case is given in Volume III. page 434.

IV.—SPENCE v. BRUCE.

Jan. 21, 1807. This case is given in Volume I. page 206.

V.—ROBERTSON v. THE DUKE OF ATHOLE.

May 10, 1816. This case is given in Volume I. page 208.

*Where the title of Prescription is a Charter and Sasine, the intermediate possession of heirs on apparency, or of disponees on a personal title, is reckoned in the period of prescription.*

THE EARL OF MARCHMONT v. THE EARL OF HOME.

IN 1695 the Earl of Marchmont being infeft in the lands and barony of Greenlaw, of which the lands of Tenandry were a part, in virtue of titles derived from the Earl of Home's predecessors, raised an action of reduction, improbation, and declarator of property of the said lands, against Charles, then Earl of Home, and at that time in possession of the lands. The defender produced a Crown charter containing the lands of Tenandry, obtained by James Earl of Home in 1638. He also produced infeftment on the said charter, also the retour of Alexander Earl of Home, as heir to the said James, his grandfather, in 1707, also precept and sasine on the retour; and alleging possession on that title, he pleaded a title to exclude.

July 28, 1724.  
NARRATIVE.

PLEADED FOR THE PURSUER.—A continued course of uninterrupted infeftments from the death of Earl James, who was infeft in 1638, might be admitted to supply the alleged prescriptive possession. From the death of Earl James until 1707, however, there was no infeftment at all on the part of the Earls of Home. During all that time the lands have been possessed by them upon the sole title of apparency. Such a possession cannot support the claim of acquisition by prescription, in terms of the Act 1617, which requires consecutive sasines. Acquisition by prescription upon an infeftment proceeding upon a new title might possibly have been sustained. The infeftment, however, founded on by the Earl of Home, proceeds not upon any new right to the lands in question, but upon the known erroneous mistake of continuing in new retours and charters of ancient families, the whole lands in which their predecessors had been infeft, even after they had been alienated and effectually conveyed to third parties.

ARGUMENT FOR  
PURSUER.

EARL OF  
MARCHMONT  
c.  
EARL OF  
HOME.  
1724.  
ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—It is admitted that a real right to lands cannot be extinguished by the negative prescription, unless these be an acquisition upon the positive prescription by another party. This plea, however, cannot avail the pursuer, for the defender pleads the positive prescription, upon a connected progress of infeftments, from the year 1638, and possession proved as far back as the memory of man can reach. The distinction taken by the pursuer between possession on infeftments actually taken, and on apparency, cannot be maintained. The original infeftment in 1638, together with the supervening infeftment in 1707, exclude any such distinction. No distinction also can be made between an infeftment proceeding on a new title, and one proceeding on the custom of continuing in new charters and retours of ancient families their old possessions, after they had been alienated. The Act 1617 makes no difference as to this point, neither is there any ground for distinction where the possession continues with the party infeft and claiming right by prescription. The infeftment 1638, with which the defender connects a progress of infeftments supported by possession, was a new and singular title, and although the party upon whose resignation it proceeded, should be supposed to have had no title to the lands in question, yet the infeftment being supported by possession, was a good title by prescription, though it had flowed originally *a non habente*.

JUDGMENT.  
July 28, 1724.

The Lords Found, “That prescription runs by an apparent heir’s possession, though not infeft, if their predecessors were infeft by virtue of a charter.”

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## II.—CAITCHION v. RAMSAY.

Jan. 22, 1791.  
NARRATIVE.

In 1713 a creditor of the pursuer’s grandfather led an adjudication against certain lands belonging to him, and having obtained a charter of adjudication, he in the same year was infeft and entered into possession. In 1732 the adjudger, without obtaining a decree of expiry of the legal, sold the lands

to the father of the defender, who was immediately infeft and took possession. On his father's death in 1751, the defender entered into possession, but he never made up titles as heir to his father.

CATCHEON  
v.  
RAMSAY.  
1791.

In 1764, being forty-one years after the expiry of the legal, the pursuer, as heir to his grandfather, brought an action of reduction of the title upon which the defender held the subjects, on the ground, that before the expiry of the legal, the debt due to the adjudging creditor had been fully paid out of the rents.

The defender pleaded a prescriptive title to exclude.

PLEADED FOR THE PURSUER.—The benefit of the Statute of 1617, c. 12, introducing the positive prescription, belongs only to those “ who, along with their predecessors and authors, have bruiked heretofore, or shall happen to bruik in time coming, by themselves, their tenants, and others having their rights, their lands, baronies, annualrents, and other heritages, by virtue of their heritable infeftments, made to them by his Majesty, or others, their superiors or authors, for the space of forty years, continually and together, following and ensuing the date of their said infeftments, and that peaceably and without lawful interruption,” &c.

ARGUMENT FOR  
PURSUER.

In a subsequent part of the Statute, a distinction is made between the case of heirs and singular successors, as to the nature of the documents necessary for acquiring landed property by prescription, the law requiring in the latter a formal investiture by charter and infeftment preceding the forty years ; whereas, in the former, it is sufficient that the party pleading prescription shall produce, as the warrant of his possession, “ instruments of sasine, one or more, continued and standing together for the space of forty years, either proceeding upon retours or precepts of *clare constat*.” Still, however, it is required in all cases, that the possession shall be founded on infeftment. With regard to feudal rights, this is no less essential, than possession is in those which do not admit of sasine. This is the opinion of Mr. Erskine, who lays it down that “ possession must, by the Statute, be continued throughout the whole course of prescription upon the title of sasines,” and that

CAITCHEON  
v.  
RAMSAY.  
—  
1791.

“ the possession of an heir, before he has completed his titles, is not reckoned.”

To entitle the heir to the benefit the Statute requires not only actual infeftments, but also that those infeftments shall be continued and connected together during a period of forty years, for without this the presumption of an original right of the family ceases, or at least is by no means so strong as to make it reasonable, that those who have nothing else to shew should be put on an equal footing with persons who produce a complete and full title.

ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—In the first part of the Statute of 1617, the Legislature defines the nature of the possession which is required for establishing a right by the positive prescription. And if it had gone no farther, there might have been some reason to doubt, whether possession, unaccompanied with sasines, could be reckoned in filling up the statutory period. But in the following part of the Statute, where the nature of the title necessary for prescription is described, the meaning of the Legislature is quite clear ; nothing more being required than that the party pleading prescription shall produce a charter of the lands, with an instrument of sasine preceding the commencement of the forty years' possession ; or “ where there is no charter extant, instruments of sasine, one or more, continued and standing together.”

The Statute respects two cases very different in themselves, and which must be distinguished. The first is the case of persons whose possession flows from a title habile in its own nature for conveying the property of land, such as a charter, or disposition, with infeftment. When this original ground and authority for the possession is shewn, and the possession has been continued for forty years, whether the infeftments have been renewed in the persons of all the possessors, or some of them have possessed under apparence, it appears to be established by the Statute that the title is for ever unchallengeable.

The other case is that of persons who have no such original title to shew, but whose possession has nevertheless been attended with circumstances which plainly indicate that, although the title be not now forthcoming, it has nevertheless



once existed, and been the original warrant of the possession. This is the case which frequently occurs of heirs succeeding each other by infeftments on retours or precepts of *clare constat*. For here, be the series ever so long, still there is no evidence that the ancestor, with whom they connect themselves, had himself a title fit in its own nature for vesting the property in him ; and, according to the notions on which the doctrine of prescription appears to have been founded, such a title was an essential requisite. Nevertheless, in a case like this, there is every reasonable presumption that the possession of the estate has at first been derived to the family from such a title ; and it was most fair and equitable that the series of their infeftments should be put by the Legislature on a level with the actual production of this original title.

CAITCHRON  
v.  
RAMSAY.  
1791.

The Statute accordingly provides, that where no charter and infeftment preceding the possession, and on which it is founded, can be produced, yet if a series of sasines, proceeding on retours or precepts of *clare constat*, continued and connected together for forty years, shall be produced, this, too, shall be a good title of prescription.

In the former case, there is no doubt that a title exists habile in its own nature for conveying the property, and all that is done is to enact that the actual possession and use of that title, for forty years, shall supply any defect which otherwise might be in it, as flowing *a non vero domino*, or the like. In the latter case, again, sasines on retours or precepts of *clare constat*, continued and connected together during a period of forty years, is equivalent to production of original right by charter and sasine.

In the case of a singular title an infeftment is with propriety required at the commencement of the prescription, it being necessary to shew clearly that the party intended to hold the subject as his own ; but after he has in this manner published what his purpose is, no reason can be given why the possession of his heir, which can only be ascribed to the same title, should not have the same effect as if he himself had survived the whole space of forty years. The right of possessing the land estate held by the ancestor, which is one of the privileges of apparenry, would otherwise be a snare to those in whose favour

CAITCHRON  
v.  
RAMSAY.  
1791.

it was introduced. Indeed it does not appear why the apparent heir may not at any time, by service, remove such an objection as the present; the rule, *quod pendente lite nil innovandum*, being applicable only to rights acquired during the litigation from third parties, and not to anything which one of the litigants may do, by exercising powers that are solely vested in himself.

JUDGMENT.  
Jan. 22, 1791.

The Court "Sustained the defences."

OPINIONS.  
MS. Notes,  
Lord Swinton's  
Session Papers.

LORD JUSTICE-CLERK M'QUEEN observed,—“The defender has a good right on the positive prescription. There was a charter, and a sasine, and possession for a certain number of years. The same possession was continued by the apparent heir, and thereby the forty years were completed. This is a good title for prescription. Mr. Erskine has mistaken this matter.”

LORD PRESIDENT CAMPBELL.—“I am clearly of the same opinion. An apparent heir possessing on his predecessor's charter and sasine, possesses on a good prescriptive title.”

1. In the case of LADY MARY LINDSAY CRAWFURD v. DURHAM, June 2, 1826, the pursuer being infeft in a right of coal within the lands of Reddairney, which were conveyed to John Earl of Crawford and Lindsay, by a Crown charter in 1648, raised an action of declarator against the defender to have her right declared. The defender produced a Crown charter granted in 1739 in favour of James Henderson, who was succeeded by his nephew Sir Robert, who made up titles, and was infeft in the coal in question in 1765. Sir Robert was succeeded by his son Sir John, who never made up

feudal titles to the coal, but sold it in 1782, by missive of sale, to the late Mr. Durham, the father of the defender. In defence the defender alleged prescriptive possession on the titles made up by Sir Robert Henderson.

2. LORD CRINGLETIE, Ordinary, pronounced an interlocutor allowing a proof. The pursuer reclaimed, on the ground that the defender had made up no feudal title, but that his title rested solely on the missive of sale of 1782, granted by Sir John Henderson, who had not made up titles in his own person, and that therefore the alleged possession by the defender

and his father was not possession following on a sasine. The Court appointed the defender to condescend on the manner in which he proposed to make up a feudal title to the coal in question. He accordingly gave in a condescendence, stating that he could complete his title by means of a charge against Sir John Henderson's heir, followed by an adjudication in implement. Thereupon the Court remitted to the Lord Ordinary to sist process till a title should be made up, and when this was effected in the way proposed, his Lordship allowed the proof, which had been previously taken to lie *in retentis*, to be opened. In this case the defender's title to exclude was peculiar, in respect that it was a mere missive of sale from a former heir under the original charter possessing on apparenecy. If, however, the defender's title had been a conveyance from the original grantee under the charter, or from his heir being infeft, it may be doubted whether the Court would have thought it necessary to have ordained the defender to complete his title. Notwithstanding the peculiar nature of his title, Lord Cringletie was of opinion that it was unnecessary that it should be completed. In the Note to his interlocutor allowing a proof, he observed,—“The point of right in this case appears to the Lord Ordinary to turn on the possession by General Durham and his authors; for from what is proved the possession commenced on charter and sasine, which is enough.”

3. In the Faculty Report of the

case, the Opinion of the Court is stated as follows:—“The Court were of opinion, that a singular successor, though uninfeft, was entitled to plead the positive prescription if he could connect with an infeftment, but as there appeared to be some difficulty as to the mode of the defender connecting himself with the infeftment in favour of Sir Robert Henderson, as Sir John had never been infeft, and his daughter and representative refused to make up titles, the Court first appointed the defender to give in a condescendence stating the way and manner in which he proposed to make up a feudal title to the coal, connecting himself with the title in the person of Sir Robert Henderson, who was last infeft therein, and then sisted process till he should make up a habile title to the coal in question.” It is, however, a matter of no moment whether a party pleading a prescriptive title to exclude is bound first to complete his title by taking infeftment, as that may be done *in cursu* of the action. The important point is, that the prior possession of heirs on apparenecy, or of disponees on a personal title, may be computed in the period of prescription, and that after infeftment has been once taken on the conveyance forming the foundation of the prescriptive title, it is not essential to the plea of prescription that the possession should be referable to an infeftment in the person of the party possessing.

4. In the case of *NIELSON v. ERSKINE*, February 26, 1823, John

Nielson, by antenuptial contract with his second wife, bound himself to secure to the children of his second marriage all the heritable subjects which he should acquire by conquest during its subsistence. During the subsistence of the marriage he received a legacy which had been provided to him and the children of his first marriage. With this legacy he purchased two acres of land, in which he was infeft on a disposition to himself, his heirs, and assignees, in fee. By an antenuptial contract with his third wife, he disposed certain property, including one of these acres, to himself and wife in life-rent, and to the children of the third marriage in fee; whom failing, to his own nearest and lawful heirs and assignees whatsoever. There was no issue of the third marriage, and he died in 1747, being survived by his widow, who liferented the one acre till 1788. In 1757 his two children of the second marriage, Alexander and Elizabeth, expedite and retoured a special service as heirs of conquest and of provision under the antenuptial contract of the second marriage, and obtained a charter of confirmation of their father's infeftment in the two acres, and a precept of *clare constat* in their own favour, on which they were infeft in 1767. In 1773 Alexander died, having disposed his half to his sister Elizabeth by a *mortis causa* disposition. On his death, Elizabeth entered on possession, and continued it on apparency till 1792. She then completed her title to the share which

had belonged to her brother, and conveyed both the acres to the defender's author, and they were thereafter possessed on regular sasines. In 1817 the pursuer, as representing the heir of the first marriage, raised an action of reduction of the defender's titles, and of declarator of his own right to the two acres purchased by his father during the subsistence of the second marriage, on the ground that the two acres having been purchased by his father by means of a legacy, and not by funds acquired onerously, were not conquest, and therefore belonged to the pursuer as heir of line. The defender founded on the precept of *clare constat* in favour of Alexander and Elizabeth, on which they had been infeft in 1767, and pleaded a prescriptive title to exclude. In reply, the pursuer PLEADED—That in so far as regarded Alexander's share of the lands, the intervening period between his death in 1773 and 1792, when they ceased to be possessed on apparency, could not be taken into account in making up the forty years of prescription, because during that period they had been possessed without a sasine. The Court "Assoilzied the defender;" and it was observed on the Bench, "That as there was possession on sasines both prior and posterior to that on apparency, it was thus rendered connected."

5. The point does not appear ever to have been raised, Whether a disponent from an heir possessing on infeftments proceeding upon retours or precepts of *clare constat*

may conjoin his possession with that of his author, where the possession of the latter has not extended to forty years? For instance, an heir may have possessed on an infestment proceeding on a retour or a precept of *clare constat* for thirty-nine years, and then conveyed the land to a third party. In a question with the *verus dominus* of the land claiming it from the disponent, may the latter join his possession with that of his author so as to complete the forty years? It appears to be very equitable that he should be allowed to do so, but the words of the Statute do not seem to authorize it. The Statute recognises two different kinds of title for founding prescription. The first is a charter and sasine. The second is "instruments of sasine, one or more, standing together for the space of forty years, either proceeding upon retours, or upon precepts of *clare constat*." The case now supposed does not satisfy the provisions of the Act. It is not a case of instruments of sasine standing together for forty years,

and proceeding upon retours or upon precepts of *clare constat*. It is the case of an instrument or instruments of sasine proceeding upon either of the warrants mentioned in the Statute, but standing together not for forty but for thirty-nine years, and then followed by a charter and sasine, and possession thereon for one year. It is a case, therefore, which seeks to combine the two different kinds of title specified in the Statute, and to establish a good prescriptive right by the union of both. The case of *Nielson v. Erskine*, already given, does not sanction such a construction of the Act, because there the precept of *clare constat*, which was the warrant of the infestment founded on, was produced, and it was thus truly a case under the first, and not under the second, branch of the Statute. If the warrant in that case had not been produced, the case would then have been identical with the one now supposed. To sustain the plea of prescription in such a case, would certainly be an equitable extension of the statute.

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*A Clause of Parts and Pertinents is a sufficient title on which to prescribe a Right of Property in a subject expressly included in the titles of another party.*

I.—COUNTESS OF MORAY *v.* WEMYSS.

THE Countess of Moray sued Mr. Robert Wemyss to remove from two pieces of land, the one called Harroneas Land, the

Feb. 20, 1675.

NARRATIVE.

COUNTRESS OF  
MORAY  
v.  
WEMYSS.  
1675. other called Alexander's Land. The defender alleged absolvi-  
tor, because he bruiked these lands as part and pertinent of  
his land of Cathelhill for the space of forty years, and so not  
only had the benefit of a possessory judgment, but an absolute  
right by prescription.

ARGUMENT FOR  
PURSUER. PLEADED FOR THE PURSUER.—The Earl of Moray was infeft  
in the pieces of land in question, *per expressum*, as separate  
tenements. They could not be pertinent, therefore, of any  
other land.

ARGUMENT FOR  
DEFENDER. PLEADED FOR THE DEFENDER.—*Non relevat*, because that  
which was not *ab initio* part and pertinent may, by prescription  
of forty years, become part and pertinent, even though it had  
been before a separate tenement.

JUDGMENT.  
Feb. 20, 1675. The Lords Found, "That the prescription by possession of  
forty years, as part and pertinent, was relevant, albeit before  
that time the lands so possessed had been a separate tenement  
unless there had been interruption."

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## II.—MAGISTRATES OF PERTH v. THE EARL OF WEMYSS.

Nov. 19, 1829. The charter of erection of the burgh of Perth, and various  
NARRATIVE. subsequent Royal charters on which infeftment followed, con-  
tained a grant *per expressum* of an island called Sleepless, formed  
by a separation of the River Tay into two branches, and also  
of the fishing round it. The barony of Elcho forms the imme-  
diate adjacent bank of the river on the south, and in the titles  
it is described generally as the barony of Elcho, with parts and  
pertinents, without specification of particular boundaries.

In 1637 counter actions were brought by the Magistrates of  
Perth and the then Earl of Wemyss—the former claiming the  
property of the island in virtue of the special grant in their  
Crown charters, and the latter claiming it as part and pertinent  
of the barony of Elcho. A proof of possession was allowed,  
and decree was pronounced, in which the property of the island

was declared to belong to the burgh of Perth, and the Earl of Wemyss was declared to have right to a servitude of pasturage over it.

MAGISTRATES  
OF PERTH  
v.  
EARL OF  
WEMYSS.  
1829.

In 1829 the Magistrates again brought an action to have their right of property in the island once more declared.

PLEADED FOR THE DEFENDER.—Since the decree in the former action, the defender has acquired a prescriptive right to the island as part and pertinent of his barony of Elcho. He and his predecessors have immemorially enjoyed exclusive possession of, and exercised acts of property, upon the island. The judgment in 1637 did not form *res judicata* against the defender's plea. It proceeded on the assumption, that the titles of the Earl of Wemyss in the barony of Elcho was a sufficient title on which to prescribe a right to the island, as part and pertinent thereof, and therefore a proof of possession was allowed. The benefit of the former decree finding the property to belong to the City of Perth had been lost by the negative prescription.

ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE PURSUERS.—There are no *termini habiles* for establishing a prescriptive right on the part of the defender. The island is not only *separatum tenementum* held by the City of Perth in virtue of a special infeftment therein, but is discontinuous from the barony of Elcho, both civilly and actually, by the intervention of a navigable branch of a river, and of a right of fishing between the island and the land admitted to belong to the City. This discontinuity creates an exception from the rule that a separate tenement, in which one party was specially infeft, may be acquired as part and pertinent of a property belonging to another. The judgment in 1637 is also *res judicata* on the point.

ARGUMENT FOR  
PURSUER.

LORD MEDWYN, Ordinary, Found, “ The plea that the island of Sleepless is included *nominatim* in the charter erecting the burgh of Perth as part of the said burgh, while the defender founds his right to it merely as part and pertinent of his estate of Elcho,—and also the plea that in 1637, by a decree of this Court, the property of the said island was found to be in the

MAGISTRATES  
OF PERTH  
v.  
EARL OF  
WEMYSS.  
1829.

burgh, burdened with a limited servitude of pasturage in favour of the defender's predecessor, not sufficient to exclude the defender from a proof of his allegation that, by possession and acts of property during forty years prior to the institution of the present process, he has acquired right to the property of the said island."

JUDGMENT.  
Nov. 19, 1829.

The pursuers having reclaimed, the Court "Adhered."

OPINIONS.

LORD GLENLEE.—"If the nature of the decree in 1637 had been to find that Lord Wemyss' title was no sufficient title of prescription, I should have been inclined to think it must have continued to be the law between the parties till reduced. But I cannot consider the judgment then pronounced to have been this; for the Court allowed a proof, which would have been absurd, had the objection to the title been supported; and this being the case, I do not see why the decree is not subject to negative prescription, as it is clear there is a sufficient title in Lord Wemyss to prescribe. It is not a bounding charter of Lord Wemyss, and the island is not alleged to be held of a different superior. Then it just comes to this—if a branch of a river like this, without any allegation of intervening property, be such a discontinuity as to prevent an island beyond it being acquired as part and pertinent of the land forming the bank? I do not think it is, and then the benefit of the decree may be lost by the negative prescription."

LORD PITMILLY.—"Perhaps it would have been better if this question had been reserved till after the proof; but, as a different course has been taken, the only question is, Whether Lord Wemyss has a title to prescribe? If it cannot be made out that, in consequence of the discontinuity, he has no title, the case must be allowed to go to proof. If Lord Wemyss had been held, in 1637, to have no title of prescription, a proof would not have been allowed. I am satisfied that a great many islands are possessed merely as part and pertinent of adjoining lands, and that the right to Elcho, with parts and pertinents, is a sufficient title to prescribe a right to this island; and if so, the rest follows, for it is clear that the decree may be lost by negative prescription. The Lord Ordinary has only found Lord



Wemyss not excluded, and I can have no doubt that the judgment is right."

LORD CRINGLETIE.—"I concur. It is pleaded, 1. That the island is *separatum tenementum*; and 2. That it is actually separated. Now Stair and other writers expressly lay it down, that property held as separate tenement may be prescribed as part and pertinent of another property. If the plea of the pursuers had been sanctioned by the Court in 1637, they would never have allowed a proof, and then given to Lord Wemyss two-thirds of the pasturage, the right to which could only have been acquired as part and pertinent of his barony of Elcho, and nothing else. Therefore the title of Lord Wemyss to prescribe the island as part and pertinent was in fact then sustained by the Court; and the same title that enabled him to acquire two-thirds of the pasturage, may entitle him to acquire the whole property."

LORD JUSTICE-CLERK.—"I agree. I cannot conceive a case more in point than that of the Countess of Moray, except as to contiguity. On the averments as to that here, we cannot now hold that this is land discontinuous from the barony of Elcho in such a sense as to prevent its acquisition as part and pertinent of Elcho, and I see no more difference on the averment than if it had been divided by a high-road."

MAGISTRATES  
OF PERTH  
v.  
EARL OF  
WEMYSS.  
1829.

### III.—EARL OF FIFE'S TRUSTEES v. CUMING.

In 1676 Sir Alexander Innes of Coxtoun brought an action to have it declared that he had an exclusive right of property in certain mosses and muirs specially included in his titles. At the same time Walter Innes of Blackhills brought an action to have it found that he had a common right of property along with Sir Alexander in these mosses and muirs. A conjunct probation was allowed, and by the decree pronounced it was declared that Sir Alexander had the sole and undoubted right of property of the whole mosses libelled, and that Walter Innes had a right of pasturage over them.

Jan. 16, 1830.  
NARRATIVE.

**EARL OF FIFE'S TRUSTEES v. CUMING.**  
1880.

In 1798 the late Earl of Fife, then proprietor of the lands of Coxtoun, raised an action of declarator against Mr. Cuming, the then proprietor of Blackhills, concluding to have the decree of 1676 repeated. On the other hand, Mr. Cuming brought a declarator of common property in, and division of, the muirs in question.

**ARGUMENT FOR PURSUER.** PLEADED FOR THE PURSUER.—The pursuer's special infeftment in the muirs as parts of the barony of Coxtoun excluded the defender, who merely held Blackhills with a general clause of parts and pertinents. The question of right to it was *res judicata* by the decree pronounced in 1676.

**ARGUMENT FOR DEFENDER.** PLEADED FOR THE DEFENDER.—An infeftment in lands, with parts and pertinents, is a sufficient title on which to prescribe a possession, or a right of common property in adjoining muirs, although they may be included specially in the infeftments of another.

Although the decree of 1676 established that the proprietor of Blackhills had not then had such possession as to establish a right of property, that did not preclude him or his successors in the lands from acquiring such right by subsequent possession. The defender, for a period much exceeding the years of prescription, has exercised rights of property which cannot be ascribed to the right of pasturage secured to him by that decree.

**JUDGMENT,**  
Jan. 16, 1880.

A proof having been allowed before answer, the Court "Found, that Lord Fife's trustees have not produced sufficient titles to exclude Mr. Cuming from being heard upon the proof adduced in these actions, and remit to Lord Fullerton, Ordinary, to hear parties on the said proof, and upon all the other points of the case."

**OPINIONS.** LORD GLENLEE.—"If the case had been stated to be as appears from the proof which has actually been taken, we would just have had to consider whether we were to allow a proof; and though the proof is led, we must just consider it here in the same way as if the party were offering to prove this. We

must, therefore, look to the titles, and see if they would warrant allowing the proof which has been taken. Cuming holds his lands of Blackhills with parts and pertinents. *In dubio*, an express infeftment must be preferred to a claim under a clause of parts and pertinents ; but where there is distinct possession on such a clause, this does not follow ; and so it was held in the late case of Perth *v.* Earl of Wemyss. And besides, Lord Fife's own titles contain Blackhills, of which he has only the superiority, with this very commonalty ; and, on the whole, I do not think his titles exclude Cuming. But there is a second objection founded on the decree, which I have no doubt was pronounced in both processes ; and it is not necessary to see the interlocutor of conjunction, for they evidently went on together as one process. There was a joint probation allowed ; and this case is just in the same situation as that of Perth, where we found that future possession may acquire right of property, notwithstanding a previous decree finding only a right of servitude. I would not lay much stress on the circumstance of mosses only being mentioned in the decree, though there is some uncertainty in it ; but if Cuming can shew that he has possessed any particular subject as property, I think he is not precluded from doing so."

EARL OF FIFE'S  
TRUSTEES  
v.  
CUMING.  
1830.

LORD PITMILLY.—" I concur. As to the import of the decree there is some difficulty ; but I incline to think that it does apply to the subjects in dispute, and it establishes Lord Fife's right of property at the time, and that the defender's predecessors' right was of servitude only. The question therefore is, Whether it was open to him to prescribe a right of property since that period ? And I have no doubt but that it is. If his possession was confined to purposes of servitude, it is clear that he was not prescribing any right of property, and that his possession must be held to have been in virtue of the servitude established by the decree. But if he can shew possession as proprietor, he may, in virtue of the clause of parts and pertinents, acquire a right of property by prescription."

LORD CRINGLETIE.—" I concur."

LORD JUSTICE-CLERK.—" On the abstract question whether Cuming, on his title with parts and pertinents, may have acquired a right of property in this common, I agree with your

**EARL OF FIFE'S  
TRUSTEES  
v.  
CUMING.  
1880.** Lordships. As to the import of the decree, I am satisfied that everything was then discussed that is here contended for. The question of property was there put in issue; and I have no doubt that the decree applied to muirs, and not to mosses, strictly speaking. I have not studied the proof at all, as one party argued on a right exclusive of property in the other. Admitting the decree to be as I think it, it is still quite competent for Cuming to prove subsequent possession of a nature to acquire right of common property; but if there be no such proof, I would repeat the judgment of 1676."

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*A positive servitude may be lost by the negative prescription, even although it is engrossed in the title of the Servient Tenement.*

GRAHAM v. DOUGLAS.

**Feb. 7, 1735.**

**NARRATIVE.**

IN 1600 the Duke of Montrose feued out the mill of Millgavie to Patrick Miller, with a servitude of three cows and one horse grass over the lands of Barloch, which lay adjacent to the mill.

In 1631 the Duke also feued out to Walter Graham the lands of Barloch. The conveyance to Graham was expressly burdened with the servitude which had been formerly constituted in favour of Miller. Graham sold the lands of Barloch to Robert Douglas, the grandfather of the defender, but under express burden of the servitude. The servitude was thus engrossed in the titles both of the dominant and the servient tenement.

The pursuer having acquired right by progress to the mill of Millgavie, brought an action of declarator against the defender, for the purpose of having his right of servitude declared. The defender alleged that the right of servitude claimed had not been exercised for more than forty years past, and that, therefore, it had prescribed *non utendo*.

**ARGUMENT FOR  
PURSUER.**

**PLEADED FOR THE PURSUER.**—No prescription is applicable in the present case, neither the positive nor the negative. The

positive is inapplicable, because no one can prescribe a right in direct opposition to the constitution of his own right. The lands of Barloch were given to the defender's predecessors under the express burden of the servitude in question. A prescription of immunity cannot therefore be pleaded by the defender. To do so would be both *contra bonam fidem* and against the tenor of his own titles. The title of the defender's tenement is repugnant to such prescription, and stands as it were always in his own face.

GRAHAM  
v.  
DOUGLAS.  
1785.

In the case of a bounding title, a party cannot acquire by prescription any property beyond the limits of his title. In the same way a party cannot acquire a servitude in the face of his own title. As therefore the servitude in question is engrossed in the defender's own title to the servient tenement, it is not extinguished by the negative prescription.

PLEADED FOR THE DEFENDER.—The servitude claimed is lost by the negative prescription. The Act 1617 only regulates subjects which are necessarily for their validity constituted by writs, but does not respect servitudes. These are both constituted and extinguished without writs, solely by prescription. A tolerance of a servitude upon one's property for forty years, presumes the proprietor's consent and acquiescence to such a burden, so as to make it effectual against him in all time coming. In the same manner, the non-exercise and disuse of the servitude by the proprietor of the dominant tenement for forty years, presumes his consent to free and liberate the proprietor of the servient tenement from the burden, and is a dereliction thereof. The *animus* of the party not to use the servitude for forty years, is presumed to relieve the proprietor of the servient tenement, and is equally evinced and manifested, as well *with as without* writ. The pursuer, therefore, and his authors, having ceased to exercise the alleged right of servitude for more than forty years past, the lands of the defender are freed and disburdened from the servitude, and the right is now extinguished.

ARGUMENT FOR  
DEFENDER.

The plea of the pursuer, that the defender's title is similar to a bounding title, and that he cannot prescribe in the face of his own title, is not well founded. The case of a bounding title is

GRAHAM  
v.  
DOUGLAS.  
1785.

noways similar to the present case of a servitude. In a bounding title, a party can never extend his property further than the limits and boundary assigned in his charter. Although, however, by forty years' possession he could not acquire a right to the property, seeing he wanted a title, which must be conjoined with possession, to give an absolute right of property, yet he might by such possession acquire a right of servitude over the property. For servitude requires not an express title, but is constituted by prescription solely.

LORD ELCHIES, Ordinary, "Sustained the defence of prescription."

JUDGMENT.  
Feb. 7, 1785.

The pursuer having reclaimed, the Court "Adhered."

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*A negative Servitude cannot be lost by Prescription, except by continuous acts for forty years on the part of the Owner of the Servient Tenement inconsistent with the Servitude.*

INGLIS v. BOSWELL.

May 1, 1849.  
NARRATIVE.

IN 1780 Gilbert Meason feued from the Magistrates of Edinburgh four building stances on the north side of St. Andrew's Square. One stance he feued to Sir John Pringle, who built a house upon it, which came by progress to be vested in the defender. Upon another of the stances Meason built a house for himself, and the remaining two stances he sold to John Brough, under the burden of a servitude in favour of the disponent and Sir John Pringle, that he and his heirs should build agreeably to a particular plan, and that they should erect no other building of any kind upon any part of the areas disposed except stables and coach-houses, which were to be built in a line with the coach-house and stable belonging to Mr. Meason, and the ridges of which were to be from four to six feet lower than the ridge of those belonging to Mr. Meason, and to continue the said offices, when built, at the same height in all time coming.

In 1782 Brough disposed one of the houses to the Earl of Buchan, under a condition that the Earl and his heirs should not erect any other buildings of any kind on any part of the back-ground except stables, coach-houses, and other office-houses. The Earl of Buchan thereafter obtained a charter from the Magistrates, under the procuratory contained in the disposition in his favour, and in the charter the servitude regulating the building in the back-ground was engrossed as contained in the original disposition from Meason to Brough. The infestment expedite by the Earl upon the charter contained a repetition of the restriction.

INGLIS  
v.  
BOSWELL.  
1849.

In 1787 the Earl of Buchan conveyed the house to Sir George Ramsay, under burden that he should not erect any other buildings, of any kind, on any part of the back-ground, except stables, coach-houses, or other offices; and the charter expedite by Ramsay contained a repetition of the servitude in the same terms; but neither in the disposition of the Earl, nor in the charter following upon it, was the restriction as to the height of the building as provided in the original disposition by Meason to Brough.

In 1800 Sir George Ramsay disposed the house to trustees, under the burdens and restrictions contained in his own and his predecessor's charters and infestments of the same; and in 1808 the trustees disposed to Mr. Bell, under the condition not to erect any other buildings on any part of the back-ground except stables, or other office-houses, and the charter expedite by Bell contained the same condition. The house was thereafter acquired by the pursuer.

In 1845 the pursuer applied to the Dean of Guild for leave to build an office according to a plan in some respects interfering with the servitude in favour of the defender. The application was opposed by the defender, on the ground that the proposed building would be an infringement of the servitude created by the charter obtained by Brough in 1781.

The Dean of Guild granted warrant to erect the building proposed by the pursuer.

The respondent advocated.

PLEADED FOR THE PETITIONER.—The clause of restriction ARGUMENT FOR PETITIONER.

INGLIS  
v.  
BOSWELL.  
1849.

founded on by the defender does not exist, and has not existed in the titles of the petitioner and his authors for sixty years. Neither in the disposition from the Earl of Buchan in favour of Sir George Ramsay, nor in any of the latter titles, is the clause of restriction contained in the original conveyance to Brough to be found. There is no reference to Meason's coach-house, and no limitation either as to height or breadth in regard to the offices built on the back-ground. The only clause which has existed in the titles is that contained in Brough's disposition to Lord Buchan, being, "that they shall not erect any other buildings on any part of the said back-ground, except stables, coach-houses, or other offices."

The petitioner was therefore entitled to consider that the title was as free as the deeds and the records of infestments shewed it to be. He was entitled to trust to a prescriptive progress of titles containing no such restriction. Were it otherways, no purchaser would be in safety that a restriction might not be raised up against him, although it had been constituted more than a century before, but had been dropped out of the titles. By positive prescription, therefore, the subject in question was freed from the servitude.

A negative servitude is incapable of constitution by mere possession. It must be constituted by grant. The burden must also appear on the face of the title of the servient tenement. If for more than the prescriptive period it has vanished from the titles of the servient tenement altogether, it cannot be enforced against a party who onerously and *bona fide* acquires the subjects on the faith of the prescriptive series of titles for forty years prior to his acquisition. Were it otherwise, there would be no security afforded to land-rights. Infestment may not be necessary for the constitution of the servitude, but the burden surely must enter the titles of the servient tenement. Without such security no purchaser would be safe.

LORD CUNINGHAME, Ordinary, Found "That the new buildings proposed to be erected by the petitioner were contrary to the express terms of the servitude in the titles of his predecessor, which the advocator had a legal right and interest to enforce, and on that ground remitted the case to the Dean of



Guild, with instructions to recall his interlocutor, and to refuse the warrant as at present craved by the petitioner."

INGLIS  
v.  
BOSWELL.  
1849.

The petitioner having reclaimed, the Court "Adhered."

JUDGMENT.  
March 10, 1847.

The petitioner having appealed to the House of Lords, "It was Ordered and Adjudged that the appeal be dismissed, and the interlocutors therein complained of be affirmed."

House of Lords,  
May 1, 1849.

LORD COTTENHAM, Chancellor, observed,—“The next point is that the right has been lost, because it does not appear to have been repeated after the year 1784 in the subsequent instruments executed, not by the parties claiming the benefit of the right, but by parties deriving title from those who took the land subject to the right, and who in dealing with that land have not referred to the terms of the original charter as to the reservation, and which were ‘that they should erect no other buildings of any kind upon any part of the said areas, excepting stables or coach-houses, or other offices to be built upon a line with the coach-house and stable belonging to the said Gilbert Meason;’ the terms in the subsequent instruments being, ‘that they shall not erect any other buildings of any kind on any part of the said back-ground except stables, coach-houses, or other office-houses;’ these terms containing the restriction as found in the charter, but not limited and restricted in the way they were by the first charter.

“Now it is argued that the party who has disposed of property, reserving a certain servitude over it in favour of other property, will lose the servitude if the parties claiming the premises subject to the servitude, without his concurrence, without his presence, and contrary, of course, to his interest, should omit to put upon the register by which they have to make out their title all the reservation to the full extent to which it appeared in the original charter. If that is the law, it appears to me to be a very hard law, and very destructive of those rights which a party may think it convenient and proper to reserve to himself; because the individual not being a party to these transactions, knowing nothing of them, has no means of knowing the way in which the other parties may think proper to make out their title. He has done all he could to preserve

INGLIS  
v.  
BOSWELL.  
1849.

his rights ; he has registered the deed containing those rights. And those other parties having omitted to search the register now make this claim. If that be the law, all I can say is, one would expect to find some very distinct and decisive authority in favour of a proposition which takes away the rights of a party, not by any act of his own, but by the acts of another who has not taken all those steps which ought to have been taken for his own safety. But having attended to what has been argued and the authorities which have been referred to, I must say that I have heard no authority to establish such a proposition as that which has been contended for.

“ It is very difficult to say what the party having the right could have done if he had searched and found that this deviation in the title had taken place. There is no doubt that he would be well entitled to contend that those rights could not be interfered with by others, unless something had passed adverse with respect to himself about those rights. Now here that is not contended for, because in point of fact there has been nothing adverse. All that has been done is something inserted in the titles rather short of the restriction for his benefit. Is it to be supposed that because the right which he claimed has not been dealt with by the parties in a mode inconsistent with that right, because he has not had the opportunity of enforcing it—it not having been infringed to the extent which is now sought—that therefore he has no means of protecting it ? But suppose the restriction had not been departed from, and the premises had remained as they were contracted to be by the original charter, can it be contended that a party loses his right merely because no opportunity has arisen for his exercising it ? I am not aware that that is the law either in this or any other country, nor has any authority been produced to support such a proposition.”

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The case of *INGLIS v. BOSWELL* is not given in the Court of Session reports ; and neither the House of Lords' report, nor the

Case itself for the respondent, contains any argument on the point raised by the appellant. The appellant's argument is plausible,

being founded on the onerous and *bona fide* right of a third party purchasing on the faith of the records. The answer, however, to the argument is, that servitudes, both positive and negative, are burdens against which the records furnish no security to a purchaser. Infestment is not necessary to their constitution, and no separate register has been appointed for their insertion. In the case, too, of a positive servitude, an express grant even is not requisite. A positive servitude may be established by possession merely on the part of the owner of a neighbouring tenement. As, too, it is capable of being constituted by prescription without a grant, it may be extinguished by dereliction, even although the grant appears in the titles of the owners of the servient tenement. A negative servitude, again, cannot be constituted by possession merely. It requires an express grant, and in the case given in the text, such a grant was evidenced by the conveyance from Meason in favour of Brough, the respondent's author. A negative servitude being once constituted cannot be lost, *non utendo*. Acts of possession are inconsistent with the nature of a negative servitude. Its essence consists not *in faciendo* on the part of the owner of the dominant tenement, but *in patiendo* on the part of the owner of the servient

one. The mere disappearance of the servitude from the titles of a servient tenement, cannot injure the right of the owner of the dominant one. He is no party to the alterations of the titles, nor is it necessary that the servitude should ever have appeared in any of the titles to the servient tenement. It is sufficient that the servitude is constituted by an express grant, and this may be done in a writing apart from the titles. Acts of possession on the part of the owner of the servient tenement continued for a period of forty years, and which are inconsistent with the existence of a particular servitude, will no doubt be sufficient to extinguish it. In such a case prescription in favour of the servient tenement is clearly applicable, just in the same manner as prescription against the servient tenement is applicable in the case of a party acquiring a positive servitude by prescriptive possession. In both cases consent is presumed. In the one case consent to relinquish the negative servitude is presumed from a long course of actings inconsistent with its existence. In the other case, consent to allow the establishment of the positive servitude is presumed, from a long course of actings on the part of the owner of the dominant tenement, unobjected to on the part of the owner of the servient one.

*Although a party cannot acquire a right of property by Prescriptive Possession on a bounding title having no clause of parts and pertinents, he may on such a title acquire a right of Servitude.*

BEAUMONT v. LORD GLENLYON.

July 11, 1848. **NARRATIVE.** IN 1737 two subjects situated in the Forest of Athole were feued by the then Duke of Athole to Gilbert Stewart. The charter was a strictly bounding one, and contained no clause of parts and pertinents, and the subjects were described in the charter as "the shealings and grassings of Glaschorrie," and "the land and shealing of Riechael." The subjects were afterwards acquired by the pursuer, and in 1842 he raised a summons of declarator against the defender, setting forth that from time immemorial he and his predecessors and authors had by themselves and their tenants been in the peaceable possession of the exclusive right of servitude of pasturage over a piece of ground lying adjacent to the said subjects, and concluding for declarator that he had acquired the full and exclusive right of the servitude of pasturage over the said piece of ground. The defender resisted the claim, on the ground that the right claimed could not be acquired by the pursuer, as the subjects to which the claim related were situated beyond the boundaries of his title. He therefore objected to his title.

**ARGUMENT FOR  
DEFENDER.**

PLEADED FOR THE DEFENDER.—The pursuer's charter sets forth the specific boundaries of the subject of the grant, and contains no clause of parts and pertinents. The right communicated by the charter is strictly taxative. There is no general description of the subjects conveyed, which might let in the evidence of possession in order to shew what the subject was. The grant gives a right to graze and to have shealings on Glaschorrie. It also gives a right to the property of the land of Riechael, and to the shealings of that property, and the boundaries of both subjects are expressly defined. Any attempt to graze or sheal beyond these boundaries is a clear usurpation, unwarranted by the title, and in contradiction and violation of the plain agreement constituted by the grant and its acceptance.

The acquisition of such a right as that claimed must be traced to some title. It is admitted that such a right may be acquired by prescriptive possession under a mere clause of parts and pertinents, but the possession must be ascribed to a title of some description or other, and possession must have been taken and held in reliance upon the validity of this title. The pursuer, however, possesses no title, for it is a strictly bounding one, and contains no clause of parts and pertinents. His case is even weaker than a mere absence of title, for the title produced by him absolutely excludes the possession of the ground in dispute. The express boundaries defined in the title afford the most conclusive evidence of a contract, by which the grantor was to retain the absolute property of the lands beyond the boundaries, and the grantee was to restrain the exercise of his right to the space included within them. To construe the grant otherwise, and to allow the pursuer to pass the limits assigned to him, whether under a pretext of a right of property or of a right of servitude, is equally inadmissible. In order to establish his plea of prescription, the pursuer must bring himself within the Statute 1617, or his possession can avail him nothing. He must shew a charter to the subjects which form the subject of prescription. The title shewn by the pursuer, instead of embracing, virtually excludes these subjects. To sustain his claim, therefore, would be to allow him to prescribe a right to a subject not in accordance with, but in the face of his own titles.

BRAUMONT  
v.  
LORD  
GLENLYON.  
1848.

PLEADED FOR THE PURSUER.—The question at issue is, ARGUMENT FOR PURSUER. Whether a bounding title, without a clause of parts and pertinents, excludes the acquisition of a servitude over adjoining lands by prescriptive possession? It is conceded that a bounding title cannot be founded on, to the effect of enabling the holder to acquire by prescriptive possession the property of any lands beyond the boundaries in the title. This, however, is the sole controlling effect of a bounding title. The marking out of the boundaries is applicable only to the principal subject conveyed, and does not limit the faculty of acquiring by prescription the accessory and inferior right of servitude over adjacent lands, the bounding title necessarily being a real right

BEAUMONT  
v.  
LORD  
GLENLYON.  
1848.

to the dominant tenement, in respect of which the servitude is claimed.

A party who possesses property under a bounding title may acquire, by express grant from the proprietor of the servient tenement, a right of servitude over adjoining lands beyond the limits defined in the title. The grant may be in the shape of a mere contract, and in order to make it effectual to the grantee it does not require to be feudalized. The only requisite necessary to complete the right is possession. A possession far short of the prescriptive period will be held explanatory of the extent of the servitude, and sufficient, along with the grant itself, to give the proprietor of the dominant tenement, although holding under a bounding title, an unexceptionable right to what he has possessed. Long continued possession supplies the place of a written title, as it gives rise to the legal presumption, that the knowledge of the right on the part of the owner of the servient tenement, and his forbearance to interrupt the exercise of that right, are only reconcilable with a previous dereliction of his full and unqualified right of property, in consequence of some special arrangement, although all traces of such arrangement may have been lost. Prescriptive possession alone, combined with the existence of a real right to the dominant tenement, is equally sufficient to carry with it certain rights and privileges as a special grant, and effect must be given to both, notwithstanding any limitation as to the boundaries of the principal subject.

JUDGMENT,  
July 11, 1848.

The Court "Repelled the objection to the pursuer's title."

OPINIONS.

LORD PRESIDENT BOYLE.—"It has been decided over and over again, soundly and reasonably, I think, that a bounding title, without a clause of part and pertinent, precludes a party from acquiring property beyond by prescription. But I find no such decision with regard to servitudes, and I think the distinction taken by Lord Fullerton, in the case of Liston, is solid and reasonable. It is maintained, that Mr. Beaumont's title being only to the 'shealings and grassings' of Glaschorrie, he has not an absolute right of property in these lands, but only a right of pasturage. On this point, I think the decision in the

case of *Breadalbane v. Campbell* distinctly applies. On the whole, I feel called upon to repel the objection to Mr. Beaumont's title."

BEAUMONT  
v.  
LORD  
GLENLYON.  
—  
1843.

LORD MACKENZIE.—"The summons is a little vague; but I look upon it as setting forth that Mr. Beaumont is proprietor of both subjects of Glaschorrie and Riechael. In this preliminary question of title we must assume that to be true. This puts an end to a great part of the case. The Lord Ordinary's difficulty is, that there cannot be a servitude to a servitude. I don't think the terms of the pursuer's title, as stated, infer that the property of the subjects was not conveyed to him. A shealing or a grassing is a natural and intelligible name for a Highland pasture-farm.

"The only question, then, is as to the pasturage on the defender's lands; and when we come to it, the objection is want of title applicable to the pasturage. The ground of claim is property in certain lands, with immemorial possession of pasturage on those adjoining. There is a denial of the possession, and further, assuming possession, an objection to the pursuer's title as being a bounding one, and without a clause of part and pertinent. On this point I incline to agree with your Lordship. I think the general rule is, that to constitute a servitude by prescription, the party shall, along with prescriptive use, have a valid title to the dominant tenement. It is said that there are two exceptions to the general rule. *First*, Where the title to the dominant tenement does not contain an express conveyance of part and pertinent. That, if well founded, would apply without a bounding charter. Whether bounding or not, if it were a conveyance of the lands of A simply, it would be exclusive of all title to hold A as dominant over the lands of B. I am not satisfied that is our rule. On the contrary, I think that a conveyance of the lands of A, with possession for forty years, of a servitude over the lands of B, is title and possession sufficient for acquisition of the servitude as a quality of A. *Second*, It is said that there is a bounding charter, as well as a want of a conveyance of part and pertinent. Here I have a little difficulty as to the fact. The title to one of the subjects, Glaschorrie, is strict enough; but, as regards the other, it is not at all limited in the charter; and I don't hold that when a

BRAUMONT  
v.  
LORD  
GLENLYON.  
1848.

party gets a conveyance of lands by name merely, it is changed into a bounding charter by a decision of an arbiter drawing the line of march. I may ask, Would the decision of the arbiter be sufficient in a question of prescription like a bounding charter? If there had been prescriptive possession on a charter and sasine not bounding in disregard of the decree-arbitral, would not the decree vanish? Not to dwell on this, suppose there is here a bounding charter as to both subjects,—even in this view I cannot say that the bounds in the charter are bounds of anything but the property. It does not follow that this bounded property may not have various servitudes. In fact, an estate, however bounded, must have some rights reaching beyond the bounds. It must, for instance, have a right of access. But why may it not have others? I don't see that there would be anything inconsistent if, after the bounding of the property, the charter conveyed a servitude. If not, there is no exclusion of servitudes by the bounding. On the whole, it appears to me that the weight of authority is in favour of the view I have stated. The only decision exactly in point is that of Liston. As to the case of Saunders, I don't think it applies at all."

LORD FULLERTON.—"The question is a very general one, viz., Whether a bounding title, without a clause of parts and pertinents, is a sufficient title to enable a party to plead that he has acquired, by prescription, a servitude over other lands? I rather think, chiefly on the grounds already mentioned by your Lordships, that it is a sufficient title. In the first place, it is clear that a servitude does not require sasine, in express terms. Being nothing but an accessory to the dominant tenement, there is no absolute necessity for the mention of it in the title. But if this be so, it is impossible to hold that the mere circumstance of the feudal title to the lands, being strictly defined by limits, is sufficient to prevent known accessories from attaching to it, which in themselves do not require to be strictly mentioned. The essential circumstance is the possession, that being held to imply that there has been originally a grant from the proprietor of the land over which the servitude is constituted. Indeed, the law, as laid down by Mackenzie and Erskine, seems to involve the proposition, that the use of the servitude for forty



years implies that there has been an accessory right created in favour of the dominant tenement.

“ The case alluded to, which I decided in the Outer House, went very far ; indeed further than is necessary for the decision of the present.

“ My judgment was adhered to by this Court ; but my impression is, that if I had been apprized at the time of the loose judgment in the case of Saunders, I should have hesitated to pronounce it. However, the Court, with that judgment in their view, did not hold it an authority. For it must be admitted that it would be difficult to reconcile the one decision with the other.

“ But the case of Liston differed essentially from the present. There, a possessory judgment was claimed in favour of the servitude, founded on the bounding title and seven years’ possession. Here, the point is whether such a title, when combined with a possession of forty years, is sufficient to establish the right.

“ Now, this last point was clearly assumed to be in the affirmative, even in the case of Saunders. For that, too, was the case of a possessory judgment ; and it appears from the opinion of Lord Glenlee, to which the other Judges adhered, that though the limited title was not held in itself to warrant a possessory judgment, it might establish a title, if a forty years’ possession were proved. But that is enough to decide the present case, in which the only question is, Whether a title, strictly limited as to the lands, is or is not exclusive of all servitudes, for whatever period they may have been possessed ?”

LORD JEFFREY.—“ I agree with all the opinions that have been delivered. When it is once laid down that a servitude, especially the known servitude of pasturage, is an heritable right accessory to heritable property, and that it does not require special notice in the feudal conveyance either of the dominant or servient tenement, then I think it is plain that the prescriptive possession of it does presume necessarily all that is requisite to its constitution. If you don’t require to have it mentioned in the feudal conveyance of the property to which it is accessory, it must follow that immemorial possession, openly and continuously had, implies a grant : and I think the whole train of authorities confirms that view.

BRAUMONT  
v.  
LORD  
GLENLYON.  
1848.

BEAUMONT  
v.  
LORD  
GLENLYON.  
1848.

“ It is quite plain here, that the right to the dominant tenement is a right of property. The cattle to be grazed on the servient tenement must, however, be connected with the dominant, for the servitude must be an easement to it. It is quite plain, I think, that there is a limitation to the use and convenience of the dominant tenement as the birthplace and general home of the cattle belonging to the owner. He sends them in summer to the servient tenement as may be necessary, to the easement of his other lands. I think, therefore, there is nothing in the specialty by which the Lord Ordinary seems to have been perplexed ; and in that view of the matter, as well as all the others, I am inclined to concur with your Lordships. I foresee, however, that it will be a very difficult question when it comes to proof ; for the party must prove possession *as a servitude*, and guard himself against the objection that he is attempting to prove possession as proprietor. It is for this reason that I have pointed out the necessity of his shewing that the animals pastured on the disputed ground did truly belong to the dominant tenement. But that difficulty is apart from the question of title now before us. The bounding charter would not prevent a grant of the servitude ; and if not, it could not prevent its being acquired in an equally valid way. It can exclude nothing from being acquired, which does not require to appear on the face of the sasine.”

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1. The defender's plea, in the case of BEAUMONT v. LORD GLENLYON, that the pursuer was claiming a right not warranted by his title, was an erroneous application of the principle that a party cannot prescribe a right of property on a bounding title. Where a party claims a right of property, and ascribes his prescriptive possession to a bounding title without a clause of parts and pertinents,

he is then unquestionably making a claim not warranted by his title. If the title had contained a clause of parts and pertinents, the possession of the subject claimed would then be ascribed to such a clause as warranting the possession. If, again, without a clause of parts and pertinents the title had not been a bounding one, the prescriptive possession might then have been founded upon as explanatory

of the extent of the subject conveyed. A bounding title, however, without a clause of parts and pertinents, affords no title to which the possession of the subject claimed can be ascribed. But possession without a title is insufficient to establish a prescriptive right. A claim of property, therefore, by a party founding on a bounding title is inconsistent with the title founded on. A right of property, however, and a right of servitude, are altogether different in their nature. There is nothing, therefore, inconsistent with or opposed to a bounding title in a claim, not of property, but of servitude. Possession, therefore, of a servitude for the space of forty years will presume the existence of an express grant, and the circumstance of the dominant title being bounded will not prevent the acquisition of the servitude by prescription.

2. In the case of *SAUNDERS v. HUNTER*, February 26, 1830, it was held that a proprietor of a feu with a strictly bounding charter, and containing no clause of parts and pertinents, but merely alleging forty years' possession of a servitude of road, was not entitled to a possessory judgment to the use of the road. LORD GLENLEE observed,—“Though the advocates allege forty years' possession, the Sheriff Court is not the place to prove that. Even on their own shewing, they have merely the means of establishing a title, but there is no title yet established, and therefore there can be no ground for a possessory judgment.” A contrary judgment was given

in the case of *LISTON v. GALLOWAY*, December 3, 1835. In that case Miss Galloway was the proprietor of a feu on a bounding title containing no clause of parts and pertinents. Liston, an adjoining proprietor, considering that his property was not burdened in his title with any burden of ish and entry in favour of Miss Galloway, shut up a gateway by which she was in the habit of having access to her property. Miss Galloway complained to the Sheriff, who allowed a proof, when it appeared that for much more than seven years past Miss Galloway had constantly used the close belonging to Liston as an access to her garden. Liston PLEADED—That no length of possession on a bounding title could establish a right of property beyond the boundary in the title, owing to the total want of title, and that a title of some kind was as necessary to found a possessory judgment at the end of seven years, as it was to found a declarator of property at the end of forty years. Miss Galloway PLEADED—That although she could not prescribe a right of property in the face of her title, there was nothing to prevent her acquiring any known right of servitude, especially such as that of ish and entry, which was not at all contradictory to her title. The Sheriff found Miss Galloway entitled to the benefit of a possessory judgment.

3. Liston having advocated, LORD FULLERTON, Ordinary, repelled the reasons of advocacy. In a note, his Lordship observed,

—“In regard to the respondent’s title, it appears to him that a bounding charter, though it may be conclusive against a claim of property beyond its limits, is not necessarily exclusive of any of the known rights of servitude over adjacent properties, such as that of ish and entry, forming the subject of the present discussion, and therefore does, if supported by the requisite proof of possession of such servitude, afford a sufficient title for a possessory judgment.” Liston having reclaimed, the Court “Adhered.” LORD BALGRAY observed,—“I think the interlocutor quite right. There is no rule of our law more salutary in itself, or

better established, than that which declares that a party who has enjoyed peaceable possession of a right for seven years, is entitled to be protected in it against summary inversion of the state of possession. The respondent was entitled to that protection in the meantime, and that is all which has been found in her favour.” LORD PRESIDENT HOPE observed,—“I entirely concur; and I own it would appear to me that the judgment in the case of Saunders, which has been referred to, would deserve to be reconsidered, if it is opposed in principle to the decision which we are about to pronounce in this case.”

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*A right of Reversion recorded in the Register of Sasines is no bar to the Positive Prescription.*

SCOTT v. BRUCE STEWART.

July 1, 1779.

NARRATIVE.

THE lands of Bloster, in Zetland, formerly belonged in property to the Sinclairs of Scalaway. In 1768 they were wadsetted by that family to Stewart of Biggton, the defender’s author. The pursuer, being vested in the right of reversion which was formerly in his authors, the Sinclairs of Scalaway, brought an action to have it declared that the lands were redeemable, and to have the defender ordained to renounce and discharge his right over them on receiving the money for which the lands were wadsetted. The defender produced an absolute disposition of the lands, granted in 1706 by Charles Stewart of Biggton, to his son John Laurence Stewart, with infeftment taken upon it in 1709. Having possessed in virtue of this title, he pleaded a prescriptive title to exclude.

PLEADED FOR THE PURSUER.—The right of reversion, on which the pursuer's action is founded, is contained *in gremio* of the original right granted by his authors, the Sinclairs of Scalaway, to the defender's authors, the Stewarts of Bigton. In the infestment following upon that right the reversion is incorporated, and the infestment being recorded, the right is perpetual, and not liable to be lost by prescription.

SCOTT  
v.  
BRUCE  
STEWART.  
1774.  
ARGUMENT FOR  
PURSUER.

A reservation, being a faculty which the reverser may use or not as he thinks proper, is from its nature perpetual. It was necessary, therefore, for the Statute 1617, c. 12, to subject reversion to the negative prescription. But the act excepts from the rule thus established, reversions *in gremio* or recorded. The Statute, therefore, clearly intended that they should remain on the former footing, entirely free from the statutory regulation of prescription. It is impossible to express the distinction intended to be made between latent reversions and those published either *in gremio* of the wadsetter's infestment, or by recording the separate deed more strongly than the Act does when it uses these words :—"In the which case, seeing all suspicion of falsehood ceases most justly, the actions upon the said reversion engrossed and registered ought to be perpetual." This expression "perpetual" imports that such reversions should in no case be liable to prescription, but remain according to the nature of a faculty, perpetual, in the full and natural sense of that word. In the case of *Elliot v. Maxwell*, it was solemnly determined that a recorded reversion could not be cut off by forty years' possession on absolute titles. The Court found, "That the reversion being registered in the Register of Sasines and Reversions, does not prescribe."

The defender's objection, that the right of reversion cannot be considered *in gremio*, because it is not contained in the disposition 1706 and the infestment 1706, which he produces as his title to the lands, is too critical a construction of the Statute. A reversion *in gremio* is as effectually published by recording the wadsetter's infestment as a separate reversion is by being recorded apart. The former, by its publication, is equally above the suspicion of falsehood with a recorded reversion.

SCOTT  
v.  
BRUCE  
STEWART.  
1776.  
ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—The exception in the Statute 1617 does not apply to the reversion in the present case. The reversion is not a registered reversion in terms of the Statute, neither is it a reversion incorporated *in gremio* of the titles produced and founded upon by the defender. The words of the Statute are, “except the same reversion be incorporate within the body of the infestment *used* and *produced* by the possessor of the said lands for his title of the same, and registered in the Clerk of Register his books.” The defender produces and founds upon absolute titles of property, unqualified by any reversion. All that the Act 1617 requires, is a title of property clothed with forty years’ possession. The defender having shewn this, he is secure, by the force of the Statute, against all latent rights of reversion, or other ground of challenge whatever, which have not been made the foundation of a claim within the forty years.

The pursuer’s claim to the reversion is cut off by the negative prescription, and the pursuer is secure by the positive prescription. In order to secure a right of reversion from prescription, it must appear in the titles to the lands within forty years of bringing the action. Without this, latent claims of reversion might operate for ever, without limitation. If the right of reversion once incorporated is understood to be perpetual, no purchaser can be safe. In the case of tailzies, an heir, whose predecessor was fettered by the strictest entail, may get quit of it by making up his titles in fee-simple, and being allowed to possess upon an unlimited right of forty years. Nothing can be more apposite than this to the present case. The case of *Elliot v. Maxwell of Nithsdale* seems to have gone upon the letter of the Statute with respect to registered reversions; but the present case, which relates to a reversion once engrossed in the titles, and afterwards left out, is very different from that case. The presumption is, that the right of reversion was left out *ex proposito*, as being discharged and extinguished, and if this is not challenged within forty years, the party is secure, and the reversion will be cut off by prescription.

JUDGMENT,  
Dec. 18, 1776.

The Lords “Repelled the first objection to the sufficiency of the defender’s title, to exclude.”

LORD BRAXFIELD, Lord-Probationer, reported the case to the Court, and observed,—“The first question, as to the validity of the exclusive title, is of great importance. I am clear that the exception in the Statute 1617 is no bar : the Statute relates to negative prescription only. As long as a person possesses on a right bearing a reversion *in gremio*, his possession is that of the reverser ; and the reverser’s right must be saved from a negative prescription. But it is not possible to suppose that the Statute meant to hinder a man from acquiring a right which he had not before. A right *a non domino*, after the years of prescription, is as valid as a right *a vero domino*. There is a legal presumption introduced that all rights were conveyed. As to the case of Elliot of Arkleton *v.* Maxwell, I am as clear as I was ever in my life that it was a wrong decision. Besides, it applies not to this case. It would wound the Statute 1617, if a registered reversion was to be a perpetual bar against prescription.”

SCOTT  
v.  
BRUCE  
STEWART.

1776.

OPINIONS.  
Hailes’ Deci-  
sions, Vol. ii.  
p. 780.

LORD MONBODDO.—“It was not necessary to make a Statute that a right of reversion in a man’s own right should be good against him ; for no one can object to the right on which he founds. If this right had been engrossed in the titles of prescription, it would have been good. It is true that the defender here has acquired a right from a person who had none ; but that is the case in matters of prescription in general. A man, in the case of lands, may, by means of an erroneous title and a long life, acquire a right to himself. As to the case of Arkleton, it does not apply, and, if it did, I should think it a wrong decision. Lord Dirleton says, ‘Why should not a right of reversion on record prescribe as well as a bond on record ?’ I think that there is much reason for the query.”

LORD HAILES.—“I am of opinion with the Lord-Probationer, as to the first general point.”

LORD PRESIDENT DUNDAS.—“I am clearly of opinion with the Lord-Probationer as to the first objection. The positive prescription is *adjectio dominii continuatione possessionis per tempus lege definitum*. There is no occasion to attack the decision in the case of Arkleton ; but I cannot reconcile it with the principle which I lay down as to the nature of positive prescription.”

1. The case of *Elliot v. Maxwell*, decided in 1727, and reported by Lord Kames in his *Remarkable Decisions*, supports the view taken by Mr. Erskine in his *Institutes*, but it must now be held to be of no authority. In that case Adam Cunningham was infest in 1633 on a Crown charter, heritably and irredeemably. In 1643 he conveyed the lands to Walter Scott, who was likewise publicly infest, and, in 1669, he conveyed them to the pursuer's father, who also obtained a charter from the Crown. On his death the pursuer, his apparent heir, brought the estate to sale for payment to his father's creditors. In the course of the process of sale William Maxwell compeared, and pleaded that Adam Cunningham, the original author of the pursuer's father, was no more than a wadsetter, and that there was an eik to the reversion made by contract in 1663, by Walter Scott, the purchaser from Cunningham, and that this eik was duly registered. He pleaded, therefore, that the right of the pursuer's father was qualified by the reversion even in a question with creditors and singular successors, and he founded on the exception in the Statute in regard to registered reversions. The pursuer and the creditors of his father **PLEADED**—Their authors had possessed the lands for more than forty years, by virtue of absolute charters from the Crown, which contained no right of reversion incorporated in them. No document, either, had been taken by the party in right of the reversion

upon any letter of reversion. The pursuers, therefore, are secure, whatever action the reverser may have against Cunningham, the granter of the reversion, or his heirs, or against Scott, the purchaser from Cunningham, and who accepted of the right with the burden of reversion. The judgment of the Court was, "The Lords Found, That the reversion being registrat in the Register of Sasines and Reversions, does not prescribe."

2. In reporting the case of *SCOTT v. BRUCE STEWART*, Mr. Tait observes,—“The decision in January 1727, *Elliot v. Maxwell*, observed by Lord Kames, that a recorded reversion could not be cut off by forty years' possession on absolute titles, is not approved of. It occurred in a case reported by Lord Braxfield as Lord-Provocationer—*Scott v. Bruce Stewart*, December 1776. In this case it was held that possession for forty years, on absolute titles, will work off every fetter of reversion whatsoever. If an heir, whose predecessor's right was redeemable in virtue of a reversion, either registered or engrossed in the body of his infestment, makes up titles as absolute proprietor, leaving out the right of reversion, he will be rendered secure against all challenge by the positive prescription. And in the case of tailzies, an heir whose predecessor was fettered by the strictest tailzie, may get quit of it by making up his titles in fee-simple, leaving out the tailzie, and possessing on them for forty years. This was the doctrine held



by the Judges to be law, in deciding this case, *Scott v. Stewart*, and so reported by Lord-Probationer."—*Br. Sup.*, vol. v. p. 542.

3. In order to prevent a right of reversion being lost by the positive prescription, it is necessary that the reversion be clearly expressed in the infeftment of the party possessing the lands. A general reference to a reversion engrossed in the prior titles is not sufficient. In the case of *GEDDES v. MILLER*, May 28, 1819, a conveyance was granted in 1733 under burden of the "clauses of reversion contained in any of the writs above deduced of the lands above written, that are not irredeemably disposed to me." In the close of the deed the granter farther "saved and reserved power to such of the debtors in the wadset rights above deduced, to redeem the lands thereby disposed, conform to the clauses of reversion therein contained." In the precept of sasine authority was granted for infefting the disponent, "saving and reserving, however, to such of the debtors in the wadset rights above deduced, to redeem the lands thereby disposed, conform to the clauses of reversion therein mentioned." The precept was engrossed in the instrument of sasine, and in 1739 infeftment was given "with and under the reservations and powers particularly mentioned in the said precept." In an action brought by the heir of the reverser for the purpose of enforcing his right of redemption, the defender pleaded a sufficient title to exclude, and

maintained that no effect could be given to the right of reversion claimed, as it was not incorporated in *gremio* of the sasine, as required by the Statute 1617, and that the reference to it was not sufficiently clear or explicit. LORD ALLOWAY, Ordinary, Found, "That although in the disposition in 1733, followed by infeftment in 1739, there was a general clause by the grantor, binding himself to infeft his son *a me vel de me*, but 'with and under the particular clauses of reversion contained in any of the writs above deduced,' yet this cannot by implication be applied to the conveyance of the subjects in question, which appears to be an irredeemable disposition, but can only apply to those wadset rights which are *nominatim*, and expressly mentioned in the disposition, especially after the very recent decision of *Sir Hugh Munro v. Munro*, May 19, 1812, and where such a long period of possession has followed upon these titles. Therefore, Finds the title produced, which goes back to 1733, sufficient to exclude the present action." The pursuer having reclaimed, the Court "Adhered." At the advising it was observed on the Bench, "It is not necessary that the right of reversion be *verbatim* inserted. It is enough that there be such a clear and explicit expression of the nature of the right as is capable of putting people on their guard; but this is not the case here."

4. In the case of *MUNRO v. MUNRO*, May 19, 1812, *see supra*, page 373, the right of reversion did

not appear at all in the infeftments founded upon as a prescriptive title to exclude. LORD GILLIES observed,—“ No right of reversion is good unless it is registered or incorporated in the titles. But here there is neither the one nor the other.” LORD MEADOWBANK observed,—“ No reversion can be said to be incorporated in a sasine unless the import of it is clearly expressed in it. One is not bound to go and search for deeds not upon record.” In the case of *CHAMBERS v. LAW*, July 6, 1823, an action of declarator of redemption was brought, on the ground, that the foundation of the defender’s title was a re-

deemable heritable bond and sasine, and that such a title was not subject to prescription. The defender PLEADED—That the lands had been possessed on unqualified rights for more than forty years, and that any title which the pursuer or his ancestors might have had, was cut off by the negative prescription. LORD ALLOWAY, Ordinary,—“ In respect that they had produced a sufficient title to exclude, far beyond the years of prescription, and in respect of the decision of the Court in *Munro v. Munro*, May 19, 1812, assolizied the defenders.” The pursuer having reclaimed, the Court “ Adhered.”

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*The running of the Positive Prescription is suspended by the minority of the verus dominus.*

BLAIR v. SHEDDEN.

Dec. 6, 1754.

NARRATIVE.

HAMILTON BLAIR, as patron of the parish of Dalry, and as having right thereby to the teinds of the parish, brought an action against the defender and others, feuars and vassals of Kerseland, situated within the parish, for payment of the teinds of their lands, bygone and in time coming. The defenders produced charters and infeftments derived from Kerr of Kerseland, containing an heritable right to the teinds of their lands upon which they had possessed without interruption for the space of forty years, and they insisted that the property of the teinds was established in them by the positive prescription. The pursuer answered, that the prescription was interrupted by his minority, and the defenders replied, that minority did not interrupt the positive prescription.

The Lord Ordinary Found, " That the prescription was interrupted by the minority of the pursuer, and therefore repelled the defence."

BLAIR  
v.  
SHEDDEN.  
1754.

The defender having reclaimed, a hearing in presence of the whole Court was ordered.

PLEADED FOR THE PURSUER.—Minority ought to be deducted, for no distinction is made in the Statute between the positive and negative prescription. The Act declares, " That in the course of the said forty years' prescription, the years of minority and less age shall no ways be counted, but only the years during the which the parties against whom the prescription and objected were majors and past twenty-one years of age." The expression, " the said forty years' prescription," does not relate exclusively to the negative prescription. The word " prescription" is never used till mention is made of it in the declaration regarding the deduction of the years of minority. It must, therefore, relate to the title of the Act, which is " Anent prescription in heritable rights," and consequently comprehends both prescriptions. For this reason, likewise, the exception of minority is properly inserted in the place it holds in the Act, as being intended to relate to both prescriptions.

ARGUMENT FOR  
PURSUER.

According to the argument of the defender, a minor having a personal claim of debt is secured from prescription, as well positive as negative, but a minor having a real right to an estate may lose it by the positive prescription. A proper wadset is a real right, an improper one is a debt. A minor would lose the former but not the latter, which is absurd. The law could never mean to prescribe a claim of debt, and yet to destroy a claim of property.

PLEADED FOR THE DEFENDER.—According to the feudal system land can only be conveyed by writing. If a vassal could not produce titles in writing, connecting him with the superior, the land returned to the superior. It being necessary, therefore, for a party being in possession of the land to connect himself with the superior, the whole progress of titles connecting him with the superior was necessary to be preserved. These might often chance to be lost or mislaid. To remedy this in-

ARGUMENT FOR  
DEFENDER.

BLAIR  
v.  
SHEDDEN.  
1754.

convenience the Act 1594 dispensed with the production of many of these titles after the lapse of forty years. The Act established no prescription, but only a legal presumption that such deeds had existed. The Act 1617 proceeded farther, and by its first part dispensed with the production of all deeds beyond forty years. This part of the Statute introduced no prescription properly so called, but only a presumption the same in nature with that introduced by the Act 1594, but more ample. In this part of the Statute the benefit of persons in possession, the supposed proprietors, was considered. Minors ought only to be indemnified from the consequences of that diligence which their nonage occasions. As real rights, however, cannot be lost by negligence alone, the exception of minority was not necessary in this part of the Statute. The case is different as regards moveable subjects. The right to them may be lost by the negative prescription. A denial of action is equivalent to a forfeiture of the right. But minors ought not to be forfeited for their negligence alone. Therefore they are secured from the negative prescription by the second part of the Act. The clause regarding the deduction of minority relates to that prescription only. That was the prescription last mentioned, and it is referred to in the clause by the words "the said forty years' prescription."

JUDGMENT.  
Dec. 6, 1754.

The Lords Found, "That minority must be deducted from the years of the positive prescription."

1. LORD MONBODDO in his Decisions observes,—“In this case the Lords found, after a full hearing of two days of the lawyers, and a third day's hearing of one another, that the positive prescription did not run against minors; *dissent*. President and Kames, Woodhall and Shewlton. The President said that he had been very much perplexed about this

question since he first began to study law; that Justinian, and the interpreters of the Roman law who have written since his time, have made a confusion betwixt usucapion and prescription that is inextricable. By Justinian's constitution, a thing was usucapt in ten or twenty years, *tit. Cod. De Transformando Usucapione*, yet the action *rei vindicatio* was not

lost to the former proprietor but by the prescription of thirty years. The same confusion, he said, was in our law betwixt the positive and negative prescription, which are confounded in the Act 1617, and by our authors who treat of them: that what determined his judgment in the matter was the decision, 24th December 1728, Presbytery of Perth *v.* Magistrates of Perth, Dict. tit. Prescription, p. 98, where it was found that the action *rei vindicatio* is not cut off by the negative prescription of forty years, if another has not acquired the property by prescription on a good title: that this decision shewed him that the foundation of our prescription was not the negligence of the proprietor, in which case it might be interrupted by minority, but some other foundation, which, he thought, in the case of the positive prescription, was, that a man who had possessed forty years upon charter and sasine had anterior rights, which were destroyed by fire or any other accident. Now, from a prescription of this kind, founded not upon negligence but upon such a presumption, there is no reason why minority should be deduced."—*Br. Sup.*, vol. v. p. 825.

2. LORD MONBODDO then continues,—“Upon this it may be observed, that there is no contradiction betwixt the property being transferred by usucapion in ten or twenty years, and the general rule of personal actions lasting thirty years; because the *rei vindicatio* must, by the nature of the thing, be an exception to that rule, since

it can last no longer than the right of property in which it is founded. The case is different with respect to the hypothecary action, which, by the Roman law, lasts after the debt is prescribed; *L. 2, Cod. de Evictione Pignoris*; vide *Decis. Frisic. Zach. Huber. Observat.* 28; but the reason is also different: that it is indeed better when, as in our law, the right of property and the right of action prescribe in the same time; and it would be introducing a kind of dissonance and absurdity to make the prescription of the action to be interrupted by minority, and yet not the prescription of the thing; so that a man may have lost his estate by prescription, and yet not have lost the right of action for recovering of that estate: that all that was decided in the case of the Town of Perth is, that the *præscriptio longissimi temporis* does not take place with us, and that nothing can be acquired by possession, according to the law of Scotland, without a just title; that is, in other words, that we have no prescription of rights of property except usucapion; so that nobody can lose his right of property except somebody else acquire it. And this decision was according to good principles; for while I retain my right of property, it is impossible that the action *rei vindicatio* can ever prescribe; or, *vice versa*, the property being lost, the action must also be lost. It does not therefore follow, from this decision, that our prescription is not founded on negligence, but that we have no pre-

scription at all of this kind. Supposing that positive prescription were to be founded upon the presumption mentioned, yet it would not follow that this presumption ought to take place against minors: our positive prescription would still be an *adjectio domini* by continuance of possession. Now, why should that possession run against minors, or why should not they be saved against prescription of their lands as well as of their obligations?"

3. Some lawyers have doubted whether the suspension of the running of the positive prescription should not have been confined to the negative prescription only. LORD THURLOW in the BURGONY CAUSE observed on this point,— "The Act 1617 introduced the positive prescription, as it is called, into the law of Scotland; and it enlarged and corrected the negative prescription. The negative prescription is a title, in bar of all action for claiming a right after the lapse of forty years. This is the only sort of prescription known

in this country; and it is the only sort known in the Roman law; the positive prescription then introduced into the law of Scotland was novel in that country, and is unknown in all others. This, instead of applying the prescription to the person, applied it to the possession, whether upon a good or bad title, and made the lapse of forty years a sufficient confirmation of it. I have considered this Act 1617 with as much attention as I could; and, if it had fallen upon me to decide the question, I should have held, that the last clause in the Act relative to the deduction of minority, had a reference only to the negative prescription; not only because the grammatical construction required such an interpretation, but because the exception is contrary to the nature of the positive prescription. But this point was decided differently a long time ago. It is not impossible to interpret the Statute so as to justify that decision; and it would be dangerous to bring the matter into question now."

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*Where an Entailed Estate is possessed on a Fee-Simple Investiture, the running of Prescription upon that Investiture is not suspended by the minority of any of the heirs-substitute, either immediate or remote, unless the right of succession has actually devolved upon him.*

#### I.—GORDON v. GORDON.

Dec. 21, 1784.

NARRATIVE.

IN 1730, Mr. Gordon of Whiteley entailed his estate in favour of his son Alexander and his heirs-male, whom failing, to Charles

his brother, and his heirs-male. Alexander, having succeeded his father, neglected the entail, and in 1739 took infeftment in the lands, in virtue of a precept of *clare constat* from the superior. On this title he possessed the estate until his death in 1783. Having died without issue, the next heir of entail was the pursuer, George Alexander, the son of Charles Gordon, the brother of the entailer. Charles Gordon had died in 1775, and at that time his son, the pursuer, was only two years of age.

GORDON  
v.  
GORDON.  
1784.

On the death of Alexander in 1783, his sister and heir of line, Janet Gordon, claimed the property, on the ground that her brother had acquired by prescription immunity from the fetters of the entail. The heir of entail insisted that prescription had been interrupted by his minority.

PLEADED FOR THE HEIR OF ENTAIL.—The claimant seeks only to have his own minority deducted, and not the minority of any other substitute. At the death of his father in 1775, six years were wanting to complete the statutory period of prescription on the fee-simple title. At that time the claimant was only two years of age, and he was the immediate heir-substitute of entail. After his father's death, the claimant was the person against whom the prescription was operating. He is also the person against whom the prescription is now objected. He is therefore entitled to plead, in the precise terms of the Statute, that the years of his minority shall not be counted, but only the years during which the parties against whom the prescription is used and objected were majors.

ARGUMENT FOR  
HEIR OF EN-  
TAIL.

PLEADED FOR THE HEIR OF LINE.—Assuming that the exception of minority in the Statute 1617 was meant to extend to the positive as well as to the negative prescription, yet that doctrine is not applicable to the case of an entail whereby there are a number of substitutes, all having a title and an interest to bring an action for making the entail effectual. The whole heirs of tailzie fall to be regarded as a collective body, some having nearer and some more remote interest, but all of them having an interest. Among substitute heirs of entail, minors might always be found so as to create a perpetual interruption.

ARGUMENT FOR  
HEIR OF LINE.

GORDON  
v.  
GORDON.  
1784.

Nor would the evil be prevented by limiting the deduction of minority to the nearest heir in substitution, for though not by the co-existence, yet by the succession of minors, the interruption might be continued without end. Under an entail, two distinct interests only arise,—the interest of the heir in possession, and that of the substitutes in expectation. To each of the substitutes indiscriminately, whether nearer or more remote, an action is competent for the protection of their right, the right being common to all. As holding, therefore, one individual common right, the substitutes are to be viewed in the light of a collective body, the existence of which depends not on any specific number of component parts. Unless, therefore, the body consist entirely of minors, it can have no claim to any of the privileges of minority.

First Interlocu-  
tor of Court.  
July 17, 1784.

At the first advising of the cause, the Court Found, “That the years of George Alexander Gordon’s minority, from the year 1775, when his father died, fell to be deducted from the years of prescription.”

JUDGMENT.  
Dec. 21, 1784.

The heir of entail having reclaimed, a hearing in presence was ordered, and thereafter the Court altered their former interlocutor, and Found, “That the years of George Alexander Gordon’s minority were not to be deducted from the years of prescription.”

OPINIONS.  
MS. Notes,  
Elphinstone’s  
Session Papers.

LORD MONBODDO observed,—“This cause goes to the privilege of minority, which is a material question for the lieges. Every heir of entail has an interest in the entail is, if an heir-substitute is minor, the point now to be determined, if he can plead upon his own minority to prevent a plea of prescription taking place against him. This is a much more favourable case than the case of Mackerston. There the titles had been long made up. Here the person is pleading the privilege of his own minority only, and if we do not allow that plea in this case, where the estate in question was only possessed in fee-simple by the last heir, we must go so far as to find that no substitute heir of entail can plead minority as interrupting prescription. It is said that there is a distinction between positive and nega-



tive prescription. I deny that there is any such distinction in the law. There is none such in the Statute 1617. There was none such in the Roman law; nor has any writer on the law laid down such distinction. With regard to the indivisible rights of heirs of entail, it is confounding things to argue so. Every heir of entail has a separate right in the succession, independent of one another. They have no *pro indiviso* right. I am clear in this case that the prescription is interrupted by the minority of the person pleading the interruption."

GORDON  
v.  
GORDON.  

---

1784.

LORD JUSTICE-CLERK MILLER.—"This is a most important question, and is to be judged of according to what appears to be the real meaning and import of the Statute 1617, which first describes the titles on which prescription shall run, and then the persons against whom it shall run. It is not against persons having a contingent right in the estate against whom the positive prescription runs, but such persons as have a right to the estate vested in them. If this be so, no heir of entail can plead upon his minority to interrupt, unless he has in him a right to that estate such as to entitle him to compete with the person in possession, and if well founded in this idea of the law, this claimant, George Alexander Gordon, comes not within the Statute, as the claimant during the life of the late Whiteley, had no more than an eventual and contingent right in this estate, which was to go to him on the failure of the late Whiteley and the heirs-male of his body. I admit that if Whiteley had died during the years of prescription and the minority of this claimant, then this claimant would have been entitled to plead his minority as interrupting prescription, because the claimant then would have had such a right in him as entitled him to compete with the heir of line of Whiteley claiming as succeeding in fee-simple. But here the late Whiteley lived till prescription had run, so that during the years of prescription there was not in George Alexander Gordon any right to entitle him to compete. It was upon this ground that the decision in the case of Mackerston went, because, as the judgment of the Court in that case bears, those pleading their minority had not succeeded during the running of the prescription. The heirs of entail in this case, foreseeing the impossibility of prescription running in any case of entails, say, they will agree that it is only the minority of

GORDON  
v.  
GORDON.  
1784.

the next heir of entail that can interrupt, but there is no foundation in law for distinguishing between the nearest and the remotest substitutes in entails. I cannot depart from the decision of the case of Mackerston."

LORD HENDERLAND.—"The exception of minority in the Statute 1617 is very broad, extending to all minors. Minority is not an interruption, but only a deduction from the years of prescription. I am clear that the privilege of minority is so far personal as that a substitute heir of entail is not entitled to plead upon the minority of any preceding heirs under whom he takes nothing, but I think that every heir of entail is entitled to plead his own minority ; and in this way there would be no uncommon prolongation of the years of prescription, as by confining heirs of entail to plead only their own minority there never could be a deduction from the years of prescription of above twenty-one years, which is much less than may occur in many cases of fee-simple. Suppose all the heirs of entail minors, could prescription run against them ? Every heir of entail has a right to bring an action against the heir in possession to make up titles upon the entail, yet being minors, and under the management of others, they could not bring it ; and if heirs of entail can bring actions to interrupt prescription, and compel the heirs in possession to record the entail, and make up titles upon it, I cannot agree with the Justice-Clerk that only a person who has a title to compete can plead minority."

LORD BRAXFIELD.—"Considering the length of prescription, it perhaps would have been as well that the law had not made minority a deduction from the positive prescription, but I think, as the law stands, minority is a deduction ; but then comes the question, Whose minority is to be deducted ? I have always understood that it is only the minority of the *verus dominus*. The heir of entail in possession has vested in him alone the full right to that estate *sub modo* as fenced, with irritant clauses. Suppose the heir of the entailed estate in possession sells the estate, a purchaser from him possessing on proper titles for forty years is secure. No heir of entail could evict the lands from the purchaser upon a plea of minority, and if so, why should not the heir in possession acquire an immunity or liberation to himself in the same manner as a purchaser from him

would do ? It is material in this case to attend, that heirs of entail have in them an undivided right and interest in the entail. The remotest heir of entail may bring his action against the heir in possession to make up titles upon the entail as well as the nearest heir of entail. The right of action is joint in all the heirs of entail ; and where a right of action is vested in that manner, I deny that the minority of one of those having a right of action will interrupt prescription. Put the case of a copartnery, the minority of one of the partners will not prevent prescription to run, as the company had the *jus exigendi*. The case of Leslie Johnston of Knockhill was decided on that principle. The case of Sir Samuel M'Lellan's children was also decided on the same principles. It is now established that tailzies are subject to prescription, both positive and negative. It is said here that the heir of entail is pleading his own minority ; but that makes no difference. At the time of this minority he had no better right in him than any of the remoter heirs of tailzie, because Whiteley might have had heirs of his body, so that while Whiteley lived, this claimant had no better right than a mere hope of succession in the event of Whiteley having no heirs. As to allowing every heir to plead his own minority, that would throw things loose, and make property dance backwards and forwards. If the doctrine of every heir pleading his own minority is to have effect, the judgment in the case of Mackerston, though affirmed in the last resort, might be rendered ineffectual. The point now under consideration was expressly determined in that case. I have a veneration for the judgments of that period, and am for adhering to the decision of Mackerston."

LORD ESKGROVE.—"I was much diffculted ; and it was only last night that I came to be of the opinion last given, and very much upon the grounds as those mentioned by Lord Braxfield. There is a great distinction between the right of heirs of entail in Scotland and remainder-men in English entails, where there are as many entails as there are remainder-men, who have each separate rights. In the case of Kinaldie, which went to the House of Lords, it was held that the judgment in the case of Mackerston was a judgment settling the law of Scotland as to minorities of heirs of entail. It was so argued by the counsel on

GORDON  
v.  
GORDON.  
1784.

GORDON  
v.  
GORDON.  
1784.

both sides, in the case of Ayton of Kinaldie, in the House of Lords. I agree with Lord Justice-Clerk as to the right and interest of the heir entitled to plead minority. It must be such a person as can evict the estate, and a remote heir, having only a contingent right, is not entitled to plead his minority. I am for adhering to the decision of Mackerston and Kinaldie."

LORD KENNET.—"I was for the interlocutor, but am now against it, and am come to be of the opinion, that though minority does interrupt, it is only the minority of the heir having a right to claim the estate; and as this claimant could not insist to evict the estate from Whiteley during his life, I cannot admit the minority during Whiteley's life to be pleaded, because during that period there was no substantial right in claimant."

LORD ROCKVILLE.—"I am of opinion that this claimant's minority ought to be deduced, as upon his father's death he had a title to bring an action against Whiteley to make up titles upon the estate."

LORD PRESIDENT DUNDAS.—"The case of Mackerston was ably argued upon the bench. Forbes, then President, and Arniston, were clear for the decision of Mackerston, and in the case of Kinaldie the same principles prevailed; and in the House of Lords, Lord Hardwick, in the case of Kinaldie, declared that he thought the decision of Mackerston a judgment founded on the soundest principles of the law of Scotland. It is said that there is no difference between the positive and negative prescription. That is not so. There is a clear difference. No man can lose property by the negative prescription, unless some person acquire by the positive. I agree that minority interrupts, but it must be the minority of a person having a right to compete. Minority can never be sustained when pleaded by any person not having a right to compete for and to evict the estate from the person in possession. Whiteley had in him the right of the heirs of entail while he lived, and if he had left children this claimant could have pleaded no right under the entail. I am therefore clear that the right in the claimant, George Alexander Gordon, while Whiteley lived, was not such a right as founds him in pleading the exception of minority. I am therefore clear for altering the interlocutor."

“ LORDS MONBODDO, HENDERSON, and ROCKVILLE, voted for adhering ; all the other Judges were for altering.”

GORDON  
v.  
GORDON.

1784.

MS. Notes,  
Elphinstone's  
Session Papers.

II.—CREDITORS OF ACHYNDACHY v. GRANT.

The lands of Kincraigie belonged to Alexander Achyndachy, but being a Roman Catholic, they were held in trust for him by Alexander Duff. In 1728 Mr. Duff conveyed these lands to George, the son of Alexander, and to his heirs-male ; whom failing, to other substitutes, under the condition of not altering the course of succession. Infestment followed in 1740.

Jan. 31, 1792.  
NARRATIVE.

In 1738 George, in his contract of marriage, conveyed the lands of Kincraigie to the heirs-male of the marriage ; whom failing, to his heirs-male of any other marriage ; whom failing, to the heirs of Alexander Achyndachy ; whom failing, to the heirs-female of the marriage, and the heirs male or female contained in the disposition 1728. This conveyance was limited and secured by all the clauses of a strict entail, but no infestment followed upon the conveyance, nor was it put upon record in the Register of Tailzies.

In 1741 George Achyndachy died, leaving one son and a daughter, who was a minor during the years of prescription founded on. The son did not complete a title, but his creditors charged him to enter heir to his father, and sold the estate.

In order to try the validity of the title the purchaser brought a suspension, the question between him and the creditors selling the estate being, Whether the sale could be reduced by the heirs of entail under the contract of marriage ? The creditors pleaded that the entail had been cut off by prescription, and the Court ordered a hearing in presence.

Thereafter the Court “ Found that the entail was cut off by the negative prescription.”

JUDGMENT.  
Jan. 31, 1792.

LORD JUSTICE-CLERK M'QUEEN observed,—“ This entail was made in the 1738, and the granter died in the 1741. Upon

OPINIONS.  
Bell's Cases,  
p. 100.

CREDITORS OF  
 ACHYNDACHY  
 v.  
 GRANT.  
 1792.

his death, a *jus crediti* vested in every heir of entail ; they might have brought an action for forcing Achyndachy to complete his titles under the entail ; but as this was not done, and as, from the 1740 downwards, there has been possession upon unlimited titles, prescription has run against the heirs. As to the interruptions, Achyndachy's minority cannot be deduced, for it was not against him, but in his favour, that prescription was running. His minority cannot be pleaded against himself. But his sister was minor. This question was fully considered in M'Dowal's case, and the plea of interruption by the minority of successive heirs of entail overruled, on this principle, that there is a *jus crediti* in every heir of entail. Were it otherwise, there would be an end to prescription in such cases ; for there are minorities in every entail, in the person of some substitute or other. The Court, therefore, came to this opinion, that the minority of the immediate substitute only was to be deduced."

LORD ESKGROVE.—“ This question was argued in the question, *Ayton v. Monnypenny*, 31st July 1756. It was thought in this Court, that there was a right in a substitute to found on the minority of all the intermediate substitutes, since, in all cases, the minority of parties interested stops the course of prescription ; and, on that ground, it was found that a substitute might plead on the minority of the intermediate substitutes. In the House of Lords a better opinion prevailed ; for, as the pursuer was major for more than forty years, during all which time he had a right to have saved the entail, though not to take possession of the estate, their Lordships held that he could not found on the minority of the preceding heirs of entail. It was not doubted that the minority of the first substitute must form a deduction from the years of prescription. In the present case my only difficulty lies in this, that the sister was minor, and there was no nearer substitute than her brother, who was acquiring the immunity.”

MS. Notes,  
 Elphinstone's  
 Session Papers.

LORD PRESIDENT CAMPBELL observed,—“ This question as to the minority of substitute heirs of entail interrupting prescription, was repeatedly under the consideration of the Court in the case of *Gordon of Whiteley*, in the case of *Lord Dalhousie v. Maule*, and other late cases, in all of which it was held that it was impossible to go into the distinction whether it was a nearer

or remoter heir. If the heir in possession could not plead minority, it was settled that the minority of no other heir could have effect, as if we were to go into the doctrine that the minority of substitute heirs interrupts, there could be no such thing as prescription against an entail. In this case there is nothing but a latent contract of marriage, no document ever taken upon it. It was therefore clearly cut off by the negative prescription. This established in the late case of *Porterfield v. Porterfield*. Farther, were it necessary, I think here the positive prescription has taken place, and a right contrary to this entail established. George Achyndachy died in 1741. His son, Alexander, the debtor, has, since his father's death, held the possession as a fee-simple, and as the creditors have charged him to enter to his father, they connect with the right that was in the father, therefore I think that the positive as well as the negative prescription has taken place, but there is no need to urge that, as the negative prescription alone is sufficient to do the business."

CREDITORS OF  
ACHYNDACHY  
v.  
GRANT.  
1792.

1. The case of *M'Dougall v. M'Dougall*, July 10, 1737, which is given under the immediately succeeding section, differed from the case of *Gordon of Whiteley* in this respect, that during the running of the prescription, the challenger was not the immediate heir substitute. His plea, therefore, was, that the minority of the prior immediate substitute should be deducted. In resisting this demand the defender PLEADED—That a substitute of entail, before the succession opens to him, has no right to the subject, but only the expectancy of a right, and his minority can no more be deducted than that of a person who has no

concern in the matter. The Court refused to allow the years of minority to be deducted. LORD MONBODDO observes,—“Some of their Lordships founded their judgment upon minority not interrupting positive prescription at all, others upon what was last pled for the defenders, namely, that the substitutes in the entail had not the right in their persons, and for that reason their minorities could not be deducted.” If this is to be regarded as the *ratio* of the judgment, then it may be presumed that the Court would have pronounced a similar judgment, even although the pursuer had been himself a minor and the immediate

substitute heir of entail during the currency of the prescription.

2. In the case of *AYTON v. MONNYPENNY*, July 31, 1756, as reversed in the House of Lords, May 11, 1757, the defence of prescription was sustained, but there also the pursuer founded on the minority of a prior immediate heir substitute. The cases given in the text are the only ones in which the challenger was the immediate heir substitute during the running of the prescription, and who founded on his own minority only. The latter of these cases was taken to the House of Lords and the judgment affirmed, but no stress can be laid upon this circumstance, as, although the point of prescription was solemnly decided by the Court, it does not appear to have been much founded upon in the appeal, as there were other points in the case independently of that of prescription, on which the right of the creditors to sell the estate was well founded. The judgments of the Court in the two cases given in the text, can scarcely be considered as shaken by what took place in the Bargany cause; for although a contrary judgment was pronounced at one stage of that cause, yet little weight can be attached to it, seeing that it was most strongly dissented from by LORD PRESIDENT CAMPBELL, LORD JUSTICE-CLERK M'QUEEN, LORD MEADOWBANK, LORD ARMADALE, and LORD GLENLEE, and their opinion was stated on the Bench to have been the Opinion of LORDS PRESIDENT ARNISTON, FORBES, CRAIGIE, DUNDAS, and MILLER.

3. In the *BARGANY CAUSE*, *FULLARTON v. DALRYMPLE*, Mrs. Fullarton, the heir substitute under a strict entail executed by Lord John Bargany in 1688, brought an action against Sir Hugh Dalrymple and others, to have it declared that his father had incurred an irritancy for himself and his descendants, by executing a deed in 1740 inconsistent with the entail which was feudalized by charter and sasine in 1742, and that she, as next substitute after them, had right to the lands. The defenders produced the charter and infestment of 1742, and pleaded a prescriptive title to exclude. The pursuer contended that the prescription had been interrupted by her minority. LORD BRAXFIELD, Ordinary, Found, "That in computing the period of prescription, the years of the pursuer's minority are not to be deducted; and in respect that the charter and sasine 1742 are *ex facie* unexceptionable, and that no nullity or objection does from thence appear to lie against them, and that it is averred by the defender, and not denied by the pursuers, that the defender has, in virtue of that investiture, possessed the estate of Bargany, from the date thereof to the commencement of the present action, without any challenge or interruption, found, that the defender's right to the estate is secured to him by the positive prescription, and that he is entitled to hold and possess the estate under the foreshaid investiture in time coming, and that the same is sufficient to exclude the



title of the pursuers in this reduction ; therefore assoilzied from the reduction ; reserving to the pursuers to insist in the declaratory conclusions of their libel, and particularly how far the tailzie 1688 is affected by the investiture 1742, and whether or not the defender has incurred any irritancy under that entail."

4. The pursuer having reclaimed, LORD PRESIDENT CAMPBELL observed,—“ I am clearly of the opinion delivered in this interlocutor. Mr. Hamilton cannot now be disturbed in his right to this estate. He has possessed upon a regular investiture for upwards of forty years without interruption. This affords him a complete exclusive prescriptive title, and no challenge of his right under that investiture can now be listened to. If, however, he has committed subsequent deeds of contravention against the prohibitory clauses of the entail contained in his own charter 1742, these may still be challenged in a declarator of irritancy. The discussion of these will remain entire to the parties ; they make no part of the present question, which is only, Whether the defender has produced a title sufficient to exclude ? This, I am of opinion, does not admit of a doubt, unless minorities are to be deducted ; and that is a point now finally at rest, and which will not again be disputed. All questions relative to irritancies, or to the succession of the estate, must henceforth be regulated by the deed 1742.” MR. SOLICITOR BLAIR, counsel for the pursuer, then

stated,—“ If the pursuer shall be permitted to establish the declaratory conclusions of her libel, she will be able to shew that she was entitled to enter into immediate possession of the estate as next heir to Mr. Hamilton, who had irritated, and lost all right to it by its contraventions. In that respect, her situation is very different, and vastly more favourable than that of the claimants in the case of Whiteley, and the other cases which have been quoted as precedents on the other side.” LORD PRESIDENT CAMPBELL further observed,—“ The case of Whiteley was decided upon general principles. By that decision it is established, that the minority of an heir of entail cannot, in any case, suspend the course of prescription ; whether it be that of nearer, or of a more remote heir.” A hearing in presence was then ordered, when the general point argued was, Whether, supposing that Mr. Hamilton and old Sir Hew Dalrymple had incurred an irritancy for themselves and their descendants, and that the pursuer, as next substitute, would have been entitled to possession of the estate, if a declarator had been brought in due time, the prescription pleaded by the defenders was interrupted by her minority during part of the period ?

5. The pursuer PLEADED—The situation of substitutes under an entail, cannot with propriety be compared to that of a subject held by a body corporate. The substitutes have no common property, but each is proprietor in his order,

and entitled to do everything not expressly prohibited ; and so far from having a common interest, they strive to preserve the entail, while it is the object of the heir, to whom the succession has opened, to get quit of the fetters of it. The postponed heirs in the present case could indeed have brought a declarator of irritancy, but it would not have enabled them to be, like the pursuer, served heir to the person last infeft, who had not contravened, and enter into possession of the subject. The pursuer's right was not in itself different from what it would have been if she had been the last substitute, and cannot be affected by the extrinsic circumstance of there being other substitutes postponed to her. The defender PLEADED—Supposing an irritancy to be incurred, a contravener till declarator remains proprietor, and his deeds alone affect the estate. The next substitute is a mere expectant, who has not even a personal right to the subject. In this respect, he differs from an heir-apparent, or a purchaser on a disposition without procuratory or precept, and others, who have a personal right, which requires only some form to complete it. He has merely a faculty of bringing an action, a decree in which would make him proprietor, but nothing less can have this effect. Besides, the substitutes under an entail may be considered as a sort of corporate body, who have all an interest to preserve the will of the tailzier, and the same action for enforcing it. The Legislature

could not mean that the prescription should be stopt by the minority of every one of them, and if it had been intended to make a distinction in favour of the nearest substitute, it would have been so expressed.

6. The Court Found, February 9, 1796, "That in this case, in computing the period of prescription, the years of the pursuer's minority are to be deducted, and therefore that the defender has not produced a sufficient title to exclude." LORD ESKGROVE observed,—“Resting upon the authority of former decisions, I was first of opinion that the present question was to be given against the pursuer. And, indeed, if these decisions are to be regarded as precedents, there is an end to this dispute, and we must yield to them as established law. But as a hearing in presence has been allowed for discussing the point, I am led to presume that it is considered by the Court as still open ; and, therefore, taking it up upon abstract and general principles, I am now inclined to be of a different opinion, and to hold that minority must in general be deducted from the positive, as well as from the negative prescription. I have considered all the cases which have been decided, downwards, to that of Hamilton Blair, and can find nothing done by this Court to shake its authority as a precedent. In this respect, the enactments of the Statute 1617 have been followed out, though, perhaps, considering the matter in point of expediency, it might have

been more beneficial for land-rights, if the Statute had, in no instance, allowed the deduction of minority from the positive prescription. As there is no record of minorities, interruptions cannot easily be discovered; hence the security of purchasers is very sensibly affected, and a progress of titles, which does not extend very considerably beyond the prescriptive period of forty years, will scarcely be received as sufficient. But nothing less than an act of the Legislature could in this respect cut out the rights of minors. And independent altogether of the authority of the exception in the Act 1617, I am of opinion that upon general principles of equity, as well as on the principles of the civil and our own common law, the period of minority ought to be deducted. Setting aside the authority of decisions, and applying the general rules of law to this case, another point must be taken for granted, namely, that the facts alleged by the pursuer are true:—*First*, That, during her minority, Mr. Hamilton had incurred an irritancy by which he would have forfeited his right to the next heir. *Second*, That this pursuer is herself next heir of entail, in whose favour Mr. Hamilton's right would have been resolved. If she was only a remote heir, and if Sir Hew Dalrymple's family shall afterwards shew that they are nearer substitutes; then, upon the principles of the case of Kinaldy, the deduction of her minority must be refused; but, presuming, *in hoc statu*, that she was then the next

heir, and that there is yet no authoritative decision on this precise point, I conceive that Mrs. Fullarton is entitled to avail herself of her minority."

7. LORD JUSTICE-CLERK M<sup>C</sup>QUEEN dissented, and observed,—“The sole point to be determined at present is, Whether the years of Mrs. Fullarton's minority are to be deducted from the period of prescription? In ordinary cases of the positive prescription, the question as to deduction of minorities may be considered as now at rest. It has been decided, both here and in the House of Lords, that the exception in the Act 1617 applies equally to the positive and negative prescriptions. At the same time, this Statute is to be considered as one of the most valuable laws that exist in this or in any other country. The prescription it establishes is very different from the *usucapio* of the Roman law; for the period is so long that, without the grossest negligence, none can be hurt by it. Besides, in the case of an entail, such as the present, every substitute heir, however remote, is entitled to pursue an action of declarator; and the question comes thus to be, Whether a joint interest exists in a number of individuals, united in a sort of aggregate or corporate body, many of whom are always major, shall the minority of any one suspend the course of prescription? In some minute circumstances this case may be different from those of Whiteley or Achyndachy, but the principles upon which these cases were decided, extend to, and

regulate this also. The principle of these decisions was, that it is not the minority of a person having a contingent interest, but that of the *verus dominus* only, which can be deducted from the positive prescription. On this ground Mrs. Fullarton's plea must be rejected. Her counsel, indeed, have been at great pains to make out a distinction in her rights and interest under the entail, from those of the other substitutes; but, notwithstanding all that has been said, it is still true, that her right to this estate is merely contingent, and not essentially different from that of any other heir of entail, although the effects of a declarator of irritancy might prove more immediately beneficial to her. As she is not *vera domina*, she is not entitled to plead minority. Unless this rule was adopted, prescription could never run against an entail. Various cases have been put by Mrs. Fullarton's counsel to illustrate his argument, such as that of a challenge upon the head of deathbed, and that of a personal right to an estate, against which prescription does not run during the minority of the person entitled to pursue. These cases, however, are *toto cælo* different from the present. In the first, one person alone, the apparent heir, is entitled to challenge *ex capite lecti*; and, accordingly, so exclusive is his right, that even without making up titles he may discharge the action, and thereby bar the challenge of any subsequent heir. In like manner, in the case of a personal right to an

estate of which another is in possession, it is only the apparent heir who can institute a challenge. Thus, both cases are in this respect materially different from the present. In both, the competitor may be feudally vested in the estate, yet the persons entitled to pursue are not, on that account, the less to be considered as *veri domini*; and, accordingly, a disponent from them would take up the estate on the event of a reduction; whereas, on the other hand, the deeds of the competitor would fall, of course, along with his own right. Mrs. Fullarton may certainly have a stronger or more immediate interest than the subsequent heirs, but still her right is merely contingent. A declarator is absolutely necessary to its constitution, and without it she cannot serve. Let us suppose in the case of an entail, which extends its irritancies to the descendants of the contravener, that the heir in possession has disposed to the next heir in prejudice of the heirs of his own body, a contravention has undoubtedly been committed, yet the children are entitled to plead, that they cannot be injured by an irritancy which was not declared against their father while he lived, and which cannot be declared against him after his death. Upon the same principles, securities granted upon an entailed estate, unless inconsistent with the restrictions of the entail, are valid in spite of previous irritancies, if these irritancies have not been previously declared. Thus it is, that declarator is necessary

to resolve the right of a contravener, and establish that of the next substitute: and thus it is that Mrs. Fullarton's right is merely contingent, and very different from that of an apparent heir. Her minority ought, therefore, not to be deducted."

8. LORD GLENLEE also dissented, and observed,—“I at first thought that this case was decided by that of Whiteley; but, from what has since been pleaded, a shade of difference has been made out between them; yet I am still of opinion, that the solid reason on which the decisions in the cases of Mackerston and Whiteley were founded, as well as the true genuine principles of our law relative to prescription, all go to support the interlocutor. The law ought, no doubt, to protect minors from all damage which naturally befalls persons in their situation; but, on the other hand, minority ought not to be turned to their advantage, or permitted to keep the rights and interests of others in suspense and embarrassment. When prescription is opposed by the plea of minority, it must be considered whether the loss was a consequence of minority, and was necessarily inherent in that situation. Founded very much upon this consideration is the principle, that those years only are to be deducted during which the right was in the person of the minor. While the right was not in him, he could neither be better nor worse for his minority. In like manner, when the right against which prescription has been running has existed

in a numeric collective body, and might have been founded on by all of them equally, prescription is not suspended by minorities; for minority is not probably the cause that prescription has been allowed to run. All of them, whether nearer or more remote, are equally barred from pleading minority. The positive and negative prescriptions are founded upon quite different principles. The positive is a *presumptio juris et de jure* of a good right in the possessor. And the only good reason for deducting minority is, that, when only one person exists who has a title to challenge the usurper's right, and that person is a minor, the presumption in favour of possession is thereby weakened. But when there exists a body of heirs, each of whom has the same title to challenge, and yet none of them take this step, there is no reason for diminishing or overturning the force of the presumption, that the possessor's right was unchallengeable. I am little affected by the circumstance of the nearest heir having a stronger or more immediate interest than the more remote. As to the right of pursuing a declarator, they are all *in pari casu*; all of them may equally enforce observance of the entail. The circumstance of afterwards getting possession is merely a consequence of vacating the fee, but adds nothing to the right of making it vacant. Until it becomes actually vacant by a decree of declarator, the right of the next heir is neither better nor worse than that of the most remote. The

former, indeed, having a greater interest, it may be supposed that the rest will be more apt to neglect ; but this is not in fact the case. Remoter heirs of entail may often very materially improve their chance of succession, by bringing a declarator of irritancy ; which, in many cases, may have the effect of cutting off a whole line of nearer heirs. We often see applications made by remoter heirs for having entails recorded ; and if they rarely pursue declarators of irritancy, it is because contraventions are rare. When contraventions are committed, it may safely be presumed that some of them will not fail to interrupt the course of prescription. The case must always be very different from that where the sole right of challenge is vested in a minor ; and, therefore, I am for adhering to Lord Justice-Clerk's interlocutor."

9. The defender having now reclaimed, the Court "Adhered." LORD MEADOWBANK dissented, and observed,—“In order to succeed in her objection to the defender's prescriptive title, the pursuer must make out, *first*, That she would have been successful in declaring an irritancy, and obtaining access to the estate of Bargany, against both the late Sir Hew Dalrymple and his brother John, had the action been carried on *pendente minoritate*. *Second*, That an heir of entail having had such a right of action during minority, is entitled to deduct the years of minority from those pleaded against him as a bar to the action, on the ground of prescription. The second point

is undoubtedly of much subtlety, but nevertheless I esteem it to be of very considerable importance to the law of Scotland ; indeed, of such importance that I think the whole law with respect to entails must be thrown loose if the pursuer's objection is ultimately sustained. I observe it is allowed, even on the part of the pursuer, that this consequence must ensue from her doctrine, that an entail may be effectual, with respect to certain substitutes of the destination, and not with respect to others ; and how the questions that may thence arise shall be extricated upon any known principles, I am unable even to conjecture. In order to form a sound judgment upon the question, it is necessary to have a distinct conception of the difference between a declarator of contravention and a declarator of property, or a claim to an estate as *verus dominus*. If there is no material distinction between the nature and object of these actions, the pursuer, in my humble opinion, must be in the right in her objection ; for if, during her minority, the right of the prior heirs and substitutes stood resolved, and the *verum dominium* was in her, and nothing was required but the interposition of courts of justice to give efficacy to the right, she ought not now to be prejudged of it on account of the incapacity incident to her youth, or the negligence of her guardians. But if the case stood otherwise, and she had only a title in common with other substitutes to compel the prior heirs

to rectify contraventions, and to resolve their right to the property, only in case they failed to redress the wrongs complained of, then, it is plain, that having no legal title to the property, which still remained legally in the contraveners, she was vested with no separate or peculiar interest, differing in legal character from that of any other substitute, or entitled to privileges beyond what the law confers on the *jus actionis* of contravention, that belongs to all substitutes, however remote. I am free, however, to admit, that the distinction between the right in the nearest substitute, which entitles to sue a declarator of contravention for his immediate behoof, and that of a *verus dominus* kept from the possession of his estate by a reducible title in the person enjoying it, is not at first sight obvious. At the same time, I apprehend that it may, by a little attention, be distinctly conceived, that it has accordingly been solemnly recognised, and that the greatest effect has been given to it. I certainly for one, have long been taught to believe in it, nor shall I soon be induced to renounce that belief, or be led to think that Lord Arniston, President Forbes, President Craigie, Justice-Clerk Tinwald, President Dundas, and President Miller, mistook a shadowy for a substantial distinction; or that Lords Hardwicke and Mansfield, the cool spectators of our law, and therefore not, like disciples, liable to be seduced by its subtleties, were so misled as to fall into the same mistake.

The pursuer has not alleged that she was called to the succession by any condition or clause of devolution. All she states is, that a contravention, by infringing the order of succession of the entail, was committed; and on this ground alone she concludes, that she was to be esteemed *vera domina* from the date of that contravention. But I am convinced, from the grounds I have stated, that in the eye of the law of Scotland, the alleged contravener remains *verus dominus* till decree of declarator shall actually resolve his *dominium* in the estate; that the substantial right, as well as the formal title of *dominium*, remains with the contravener; and, of course, that the pursuer was nothing more than any other substitute entitled to an action, competent equally to all and each of them, for preserving the estate in its integrity, agreeably to the will of the entailor, and securing its enjoyment and descent according to the legal and established rules of construction of that will. This action belongs to substitutes severally; and, as forming a numerous body, minority cannot interrupt the prescription of such actions. It has not been contended, as far as I observe, on the part of the pursuer, that substitutes in general are entitled to be restored against the omission of bringing actions of contravention in their minority; and it could not be so contended, consistently either with the established doctrines of law pointing out to those to whom, and concerning what subjects this plea of

restitution is competent, or with any one decision, so far as I know, regarding the rights of substitutes of entail. On these grounds I incline at present to be of opinion, not only that the pursuer is not entitled to plead the objection to the exclusive title set up by the defender, but that the objection itself is ill-founded."

10. LORD JUSTICE-CLERK MACQUEEN also dissented, and observed—"The sole question now to be considered is, Whether the defender has produced a title sufficient to exclude? The answer to this question depends upon the fact, whether prescription has run upon the charter 1742; and that again hinges upon the point, whether Mrs. Fullarton's minority is to be deducted. The Act 1617 of prescription is perhaps the most valuable that exists in our statute-book, and has always been reputed the safeguard of land-rights in Scotland. At the period of its enactment, entails, with irritant and resolute clauses, were unknown; and their effect in regard to prescription could not possibly enter into the consideration of the Legislature. *Prima facie* of the Statute, and regarding only its literal meaning, it would seem that every person prosecuting any right to which prescription was opposed, was entitled to a deduction of his minority; but when entails, with irritant and resolute clauses came into fashion, and questions of prescription against them arose, it occurred, that if this rule was strictly and literally adhered to, estates in this situation

would cease altogether to become subjects of prescription, as, in the long line of substitutes, it is probable that some minor must always exist. In this manner would a great proportion of the landed property of Scotland have been deprived of the benefit of this invaluable Statute, and great inexpediency and absurdity have arisen. What, then, was here to be done? The point was somewhat puzzling; but our courts of law, upon a mature consideration of the whole case, adopted a modification of the Act 1617. They found that the deduction of minority was to be allowed only to the *verus dominus*, or to the heir apparent, who are entitled immediately to take up the estate; but not to substitutes under an entail, whose interest is merely contingent. This is a doctrine which has been adopted in many cases, and has been sanctioned by a long train of decisions. The pursuer, indeed, admits the principle, but resists the application of it. She contends that, in consequence of the contravention of Sir Hew Dalrymple and Mr. Hamilton, an irritancy has, by the conception of the entail, been incurred *ipso facto*; and that she, as next substitute, is not only entitled to an action of declarator for preserving the estate, but is herself *vera domina*, and consequently entitled to a deduction of her minority. This is a proposition to which I cannot subscribe. Mrs. Fullarton is not *vera domina* of this estate, in any sense of the words recognised in law. Let us suppose the



case that she is convicted of high treason, would the estate of Bargany be forfeited in consequence of her crime? Certainly not; until she had come into the immediate right of it as an heir of remainder. On the other hand, it is equally certain, that if Mr. Hamilton had been guilty of high treason, this estate would have escheated to the Crown during the lives of him and his descendants. It is not true, as contended by the pursuer, that in the law of Scotland, penal irritancies, especially in questions respecting heritable right, are ever allowed to operate *ipso jure*; and surely the present is as penal in its nature as can be imagined. The former proprietor, in spite of his contraventions, remains so until his right is resolved by a decree of declarator; and at any time before extract, he is permitted to purge the irritancy if he can. Indeed, the Court have always been disposed to make long arms, in order to allow the purgation of irritancies, which are in their nature odious. The case of Hamilton of Raploch is a remarkable instance. Since, therefore, no declarator of irritancy was brought until the years of prescription had elapsed, it is impossible to consider the pursuer as having been *vera domina*. She was merely a substitute, with nothing more in her than a right of expectance until such declarator was obtained. I am unable to distinguish between her and the other substitutes. They, too, had equally a right of expectancy, only somewhat weaker, because more

remote; and in its legal nature and effect precisely similar. The pursuer has ingeniously endeavoured to draw a line of distinction between this and the cases quoted as precedents on the other side. But the differences which have been alleged do not affect the general principle, upon which, I am satisfied, all of them were decided; and that of Achyndachy is precise in point with the present. My opinion upon the question at issue is perfectly decided, and I am clearly for altering the interlocutor."

11. LORD PRESIDENT CAMPBELL also dissented, and observed,—  
 "The question is, Whether the period of Mrs. Fullarton's minority ought to be deducted from the years of prescription? This is one of those points which ought to have been considered as at rest in the law of Scotland; all the decisions upon the subject, from the first starting of the question in 1739 down to the present day, being uniform against the deduction; and some of them ultimately settled in the House of Lords. It was some time a doubt whether, in the construction of the Act 1617, minority could in any case be allowed as a deduction from the positive prescription, the clause relative thereto being introduced in the end of the Act, after treating of the negative prescription; and somewhat contradictory to the strong declaration contained in the preceding part of it, that the positive prescription should be opened, 'upon no other ground, reason, or argument competent of law,

except falsehood.' It has, however, been settled by decisions, that the subsequent exception of minority applies to both; and upon these the Court ought to rest. But the present point has been no less firmly fixed by authority of the same kind, and in a still greater number of instances, where the question was most deliberately considered, viz., That in the cases of latent entails, the minority of substitute heirs, whether nearer to the succession or more remote, could have no effect, and the grounds are obvious. In the *first* place, as observed by Lord Kilkerran in the case of M'Dougall, that if the minority or infancy of heirs *in spe* were to be considered, it would be impossible that prescription could ever take place against a tailzie; *secondly*, That in the case of prescription running against a collective body of men, some of whom may be major, others minors, the exception cannot apply as in the case of an individual: and *thirdly*, That the positive prescription must always, in its nature, suppose and imply two contending parties in a right of ownership, the *verus dominus* losing by prescription, and the *non dominus* acquiring; whereas substitute heirs who are only *in spe*, and who have only a personal right of challenge for the purpose of making an entail effectual, are not either in the one situation or the other. The first of these reasons, having expediency for its basis, might not alone be sufficient, and therefore it is unnecessary to enlarge upon it. As to the second, the

words of the exception in the Act 1617 are, that only the years during which the parties against whom prescription is used and objected were majors, shall be counted. But in the case of an entail, it remains to be considered who is the party against whom the prescription is running. The person who is acquiring is the heir in possession, who has made up a wrong title, in order to shake himself loose of the tailzie, or of some limitation or fetter contained in it; but the party who is losing, and against whom the prescription is to be pleaded, is not any individual. It is the substitute heirs of entail in a body, who have all and each of them the precise same right or challenge, and the precise same remedy, though the application of the remedy may operate more to the advantage of one than of another, as he happened to be more near to the succession, or more remote from it; and as it never can be said of this, or of any collective body of men, that it is in a state of minority, so it is of no consequence in a question of prescription, either positive or negative, that some one or more of the individuals which compose this body may happen to be under age. Some of them are perhaps unborn when the prescription begins—some have only come into existence yesterday—some are of one age and some of another. All this is nothing to the purpose. We cannot suppose prescription running against one individual of this mass, and not against another. The right belonging to the whole

is of the same nature, it belongs to a *familia*, and either the prescription must run against the whole or against none. The interest which the substitute heirs of entail have in the estate, before the succession opens to them individually, is an undivided and indivisible right. If it were only undivided, and not also indivisible, like the interest, which, by the law of Scotland, different heritors of land have in a common, it might be said that A B's right can be lost, while C D's is preserved entire; but in the case of an indivisible right, the whole of which belongs equally to all, and does not admit of being separated into parts, the same consequence cannot follow.

12. "The prescription here pleaded against the substitute heirs of entail in a body, including Mrs. Fullarton, being the positive prescription upon charter and sashine, the same must be effectual against her, unless she can say that the right of property was truly in her, during the currency of prescription, in which case, but in no other, she would be entitled to plead that her minority must be deducted. It is clear, however, that the property neither was nor could be in her, unless either the whole prior heirs had failed by death, or a decree of declarator of reduction had been obtained by her in the Court of Session, setting aside the right of those prior heirs, and opening up the succession to her, so as to give her immediate access to claim the possession. In such a case, she would have been

the *vera domina* or real owner, losing by prescription, while she neglected to make her right effectual; and Mr. Hamilton would have been the *non dominus*, continuing to acquire by a title fundamentally bad. And here we must attend to the principles which regulate a Scots entail; these being essentially different from those of an English entail. With us not one particle of the fee is in the substitute heirs. The whole vests in the heir in possession. Each substitute heir, whether called generally or specially, whether of the body of the tailzier, or not of his body, has in him nothing more than a personal right of maintaining actions to force implement of the tailzie, or to challenge contravention; and this is a right which equally vests in every existing heir, or who may exist so long as the estimation lasts. We have no such thing as an estate in remainder, the whole estate being in one person, viz., the heir in possession: and, upon the death of one such heir, it remains *in hæreditate jacente* till it is taken up by another heir. All this was fully explained and illustrated in the case of Gordon of Park; and any person not already informed of the principles which were there laid down and recognised upon all hands, may look at the correspondence which passed between Lord Chancellor Hardwicke and Lord Kames upon the subject.—See Lord Kames' *Elucidations*, Art. 42, respecting Entails. It is said that Mrs. Fullarton, having been the nearest heir to the late

Mr. Hamilton of Bargany, under the entail, the legal consequence of this contravention was, to give her a direct and immediate claim to the estate ; and therefore she is in a better situation than any of the after heirs, and it ought to be held that she was the *vera domina* from the period of the actual contravention, and as the person or party against whom the prescription was running, while it is admitted that the other heirs, who were only *in spe*, could not be so held. But the argument proceeds upon an evident mistake in point of law. No irritancy operates *ipso jure* without the aid of a decree of the proper Court ; and no words, however strong, inserted in any deed of entail, can dispense with this legal and essential requisite. The party who alleges contravention must go to a Court of Law, and make out his proposition ; and it happens every day that irritancies, even when incurred, are allowed to be purged. Every defence is allowed against the penal consequence of forfeiture. Thus, if the vassal neglects to pay his feu-duty for two years, or the tenant to pay his rent, the superior or landlord may pursue a declarator of irritancy, but he cannot turn out the contravener *brevi manu*, nor will even a simple process of removing be sufficient for the purpose. In the case of an entail, no lawyer ever dreamt that even the most glaring and palpable contravention could operate without declarator ; and even with declarator it is seldom easy to prevail in such a question. If Mrs. Fullarton's

argument could be supported, she would, on the same grounds, be entitled to the rents of the estate of Bargany, from the period that she says Mr. Hamilton committed an act of contravention ; but her counsel know that to claim these would be a very wild attempt. Whether she would have been successful or not, in declaring an irritancy against Mr. Hamilton, we have not at present sufficient materials before us to judge. There are many difficulties, independent of prescription, which might have then, and may still, stand in her way ; and it is scarcely fair to take it for granted, before the case is tried, that independent of prescription, she must prevail. But it is no matter whether she would or would not. It is enough to say, no such declarator was brought, far less any decree obtained ; and therefore Mrs. Fullarton was all along merely *in spe*, just as much as the remotest heir of entail ; nor is it possible, in the present question, to distinguish between her and any other heir. The different heirs of entail have a *jus crediti* under it. The heir in possession may be considered as the debtor, and the subsequent heirs as the creditors ; and it is to the case of debtor and creditor that the negative prescription applies. But the positive prescription does not apply to that case, but to quite a different one, viz., to that of owner and owner, two contending parties in a right of ownership ; or, according to the usual phrase of our lawyers upon this subject, to a *verus dominus* and a *non*

*dominus*. It seemed to be admitted, that it would be too much to allow the minority of every subsequent heir to be deducted ; but it was said, Why not allow each heir to plead his minority, though he cannot plead that of another ? Suppose, then, the heir next to the possession has lived forty years, and twenty of these in minority, he dies, and leaves a son, just born, who consequently must be minor for twenty-one years more, and the succession opens to this person in the eighteenth year ; it must be found, according to this system, that he is barred by prescription, viz., the forty years which elapsed during his father's lifetime, whose minority he cannot plead. Yet, had the father happened to be then living, the prescription, according to the same system, would not have been good against him ; so that here is a most extraordinary case, where one minority is good, and two minorities of no avail whatever. But even if we could suppose that this question was originally attended with any doubt, is it not a most grievous circumstance, that a point of law, so firmly established by the most solemn decisions, both here and in the House of Lords, for half a century past, should now be pulled up by the roots ? What right have we to set up our own wisdom against that of so many of our predecessors in office ? It was said in my hearing, by the late President Dundas, that these decisions were approved of by President Forbes, old President Arniston,

VOL. III.

President Craigie, Justice-Clerk Erskine, and other great Judges in this end of the island ; and by Lord Hardwicke and Lord Mansfield in the other. In the case of MacDougall of Mackerston in 1739, the first heir in succession next to the contravener, as well as the contravener himself, was under age, and so was the second heir ; but these minorities were not regarded. In the case of Ayton v. Monnypenny in 1756, prescription was sustained in the House of Lords, and the minority of the substitute next to the heir in possession, though pleaded upon, does not seem to have been regarded. In the case of Gordon of Whiteley in 1784, the whole argument was again heard in presence, and the minority of the next substitute again disallowed. A distinction has been suggested between that case and the present, viz., that there was no irritant clause there ; and, therefore, the next heir could not have got immediate possession. But this is nothing to the purpose : the argument, both at the bar and upon the bench, in that case, did not go upon any such specialty, which, it is believed, was not so much as mentioned. The whole discussion was upon the general topics already suggested ; and it is clear that the heir, whose minority was objected, had the first and most immediate interest in the question, whether possession could immediately be attained or not ? In the former case of M'Dougall, there was no want of any of the clauses, and yet the judgment was

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the same. Last of all followed the case of *Achyndachy v. Grant* in 1792, which was also in point to the present case ; but the prescription was sustained, and the deduction of minority overruled, both here and in the House of Lords. The argument, indeed, was very slight upon either side in that case ; but why was it so ? Because it was considered as a point at rest."

13. The defender having appealed to the House of Lords, it was Ordered and Adjudged, Dec. 18, 1797, " That the cause be remitted back to the Court of Session to review the interlocutors appealed from, and to consider how far the validity of the title to exclude, set up by the defendant, is, in this case, involved with the title set up by the pursuer, to sustain the action of reduction and declarator, as having become the nearest substitute under the deed of entail, in the manner alleged on her behalf ; and, if the Court shall hold these questions to be in this cause involved with each other, that they do pronounce an interlocutor for or against that title, and also on the effect which such judgment may have upon the interlocutors to be reviewed." LORD THURLOW observed,—“ Mr. Erskine said at the bar, that entails were excepted from the rule allowing minority to be pleaded against prescription, otherwise they would never prescribe ; but all difficulty is cleared by this, that every heir of entail has an independent right of action ; and thus prescription will apply to him, as

well as to a stranger ; and so I think it does. It was insisted, that it would be inconvenient to allow deduction of minority to all the substitutes in an entail : for, on account of their number, the prescription would never run. This reasoning, however, proceeds upon a mistake ; for no case could occur where the prescription could run to more than sixty-one years, as every substitute has an independent cause of action ; and as he must come within forty years of the original cause of action, it is not worse to allow the deduction of minority to all the substitutes than to one individual, against whom the prescription could only run for sixty-one years. If not in existence at the time of the contravention, the prescription would begin to run till his existence. It would then be suspended during his minority : and, by the Statute, it is only the years of minority that fall to be deducted, which would still keep it within the limits I have mentioned. I do not think that upon examination, the Court will be precluded by former cases, from finding that every different heir of entail must have his own minority allowed or not allowed, as his situation may entitle him."

14. The cause having come back to the Court of Session, the Court, November 23, 1798, " Altered their former interlocutor, and sustained the title produced by the defenders as sufficient to exclude the pursuer's title, and assoilzied." On the point regarding the deduction of the pursuer's mino-

rity, LORD ARMADALE observed,—  
 “ If the pursuer ever was, or could  
 now show herself to be the first  
 substitute, I do most implicitly  
 and fully assent to every word of  
 the opinions delivered upon the  
 former question, (when I did not  
 sit here,) I mean the opinions of  
 Lord President, Lord Justice-  
 Clerk M'Queen, and Lord Mea-  
 dowbank. From the first time I  
 could distinguish the merits of  
 such a question, I had learned,  
 and held upon the authority of  
 different decisions, and more par-  
 ticularly from the deliberate and  
 full opinions of this Court in the  
 case of Gordon of Whiteley, that,  
 admitting minority to be a deduc-  
 tion from the positive prescription,  
 it was not the minority of a sub-  
 stitute, first or last, or of any or  
 all the substitutes in a tailzie, that  
 could interrupt; that it is the  
 minority of that person, and of  
 that person only, who can show  
 that he is the *verus dominus* in  
 competition with the *non domi-  
 nus*, whom the prescription would  
 otherwise support; that this is  
 the exception which the Statute  
 admits; that this is the only  
 exception which the principle of  
 the positive prescription allows.  
 And in addition to what I see  
 stated in these opinions, and do  
 adopt as the grounds of mine  
 upon this point, I shall just make  
 a single observation, illustrative of  
 the principle, and demonstrating,  
 in my opinion, the very singular  
 effects which would result from  
 allowing those who are mere sub-  
 stitutes in deeds of tailzie to plead  
 their minorities. The shape in

which cases of this kind generally  
 occur, exhibit but a very imperfect  
 view, both of the principles and  
 of the consequences attendant upon  
 the plea of minority in substitute  
 heirs of a tailzie being sustained.  
 Thus, it generally happens, that  
 the substitute who has minority  
 to plead in his favour, brings an  
 action against the heir who has  
 been acquiring by prescription  
 contrary to the tailzie; and he  
 insists that either his own mino-  
 rity, or the minority of some other  
 substitutes, shall be deducted from  
 the period of prescription, in order  
 to show, that when such deduction  
 is made, the positive prescription  
 has not run in favour of the party  
 pleading it. But let us suppose  
 the shape of the action reversed,  
 that the proprietor of an estate  
 which had been under the fetters  
 of an entail, has possessed it upon  
 unlimited titles for upwards of  
 forty years, and having thus ac-  
 quired an absolute right to the  
 estate in terms of the Act 1617,  
 he, to render the matter more  
 clear, brings an action of declara-  
 tor of property before your Lord-  
 ships, against all and each of the  
 heirs of tailzie called under the  
 prescribed deed of tailzie, conclud-  
 ing to have it found and declared,  
 that he was the unlimited proprie-  
 tor of the estate; that the heirs  
 of tailzie, if they had anything to  
 say against that plea, should come  
 forward with it; and that it should  
 be found and declared upon the  
 prescriptive right produced, that  
 the tailzie was at an end, and that  
 the estate was his without limita-  
 tion or restraint of any kind. Ac-

cordingly, a numerous set of heirs of tailzie come forward, some of them majors during the whole course of prescription, others minors during the whole course of prescription, some of them in minority during a part, and in majority during the remainder of the years of prescription, some of them who had no existence during the prescription, and others who had come into existence at the last moment of prescription. According to the pursuer's plea, that the minority of substitute heirs interrupts, it would lead to the grossest absurdity—to a situation unparalleled in the most whimsical conception of tailzies. The pursuer of the declarator would prevail in having it found, that he was free from the fetters of entail as to those who had not minority to plead; but it would be found, that he was subject to the fetters of the tailzie in regard to those who were minors; in short, that it was both a tailzied and untailzied fee at the same time, and in the same person; a situation incompatible with the law of tailzies, absurd in itself, and consequential of the doctrine that is pleaded by the pursuer."

15. LORD PRESIDENT CAMPBELL observed,—“ To understand the former judgments, as well as the present shape of the cause, we ought to consider how the question stood when it first came into Court, and what variation it has since undergone. Mrs. Fullarton brought her action for the purpose of setting aside the titles in the person of John Hamilton of Bar-

gany, then in life, and likewise all right and title which might be claimed by Sir Hew Dalrymple or his family to the estate of Bargany, on account of certain alleged acts of contravention of the entail, and for having it found and declared, that the estate did now belong to the pursuer, Mrs. Fullarton, who should be at liberty to make up titles to it by service or otherwise. Mr. Hamilton produced his charter and sasine in 1742, which, with more than forty years' acknowledged possession, he insisted upon as an exclusive title, or, in other words, a special plea in bar of the action. This is a species of defence well understood in our practice, founded on the direct enactment of a most important Statute, viz., the Act 1617, cap. 12, and which ought to have been better explained in the House of Lords, where we are told it was looked upon as an extraordinary thing, that when parties were ready to argue the merits of a cause, the Court should have allowed them to go away from the merits into a collateral point. I will take it upon me to say, that this form, so long established with us, of admitting an exclusive plea founded upon the Act 1617, is a most essential one to the land-rights of Scotland, highly expedient, so far as it abridges litigation, and to which no objection can lie in point of justice. The answer made by Mrs. Fullarton, and the only one that could possibly be suggested, was her minority during a part of the time; which minority she pleaded under the construction of



a clause in that very Statute. Her counsel admitted that there was a difficulty in applying that doctrine to the case of substitute heirs in a Scots entail, on account of certain decisions in the cases of Mackerston, &c. But by way of answer to this difficulty, they resorted to a distinction which, for the first time, was heard of in this cause, viz., between one substitute heir and another; and a majority of the Court thought, that if Mrs. Fullarton could put herself into the situation of being next in succession to Mr. Hamilton, the person actually in the fee, she might avail herself of her minority. Others of the Judges were clear that this could make no difference upon the question, that the decisions had made no such distinction, and that the principle was the same as to all. Such of us as were of this last opinion had no occasion to call upon Mrs. Fullarton to make out that she was truly what she described herself to be, i.e., the next substitute to Mr. Hamilton, and therefore in delivering our opinions we assumed nothing either in law or fact. But it must be confessed that the interlocutor, which proceeded on the opinion given by the majority of the Court, did assume what required to be proved, viz., that the pursuer was the next substitute heir to Mr. Hamilton in fact, or in construction of law; whereas upon the face of the charter, as well as of the original deed of entail, she certainly was not so, all the family of the late Sir Hew Dalrymple standing before her.

The cause, therefore, went to the House of Lords in rather a perplexed situation, and I am not surprised that it has come back to us again.

16. " Since the cause returned, I believe all or most of the writings called for have been produced, and the counsel on both sides have gone largely into the cause, in order that they may have the benefit of our opinion upon the whole merits, although it is said that the preliminary defence is not yet meant to be waived. I shall, therefore, now take a view of the cause under two distinct heads: *First*, The exclusive plea; *Second*, The merits of the competition, as arising upon the whole matter now pleaded. Having formerly delivered my opinion at full length on the exclusive plea, I only trouble the Court with a few additional suggestions. In the case of a fee-simple estate the rule is plain and easy. If the person to whom the right of fee does truly and of right belong, and from whom it is unduly withheld, happens to be under age, the years of his minority are to be discounted; and when he dies, if the next heir to him is also under age, there will be another deduction for this person's minority subsequent to his succession, and so on. It is obvious that these successive minorities may keep open the prescription for a very considerable period of time. It cannot be limited to forty or to sixty years, or any other precise period. In the case of *Wilson v. Campbell*, the action was brought at the distance of

more than a century ; and proofs were adduced of successive minorities of the pursuer's ancestors, one after another, in order if possible to bring the period of possession, free of minority, within forty years. But if once a possession, free of minority, has taken place for forty years, at any period, without challenge, or joining of different periods together, it is no matter what minority may have taken place before or after, or during the intervals of that time ; and the pursuer cannot avail himself of his own minority to open up a prescription which has otherwise been completed, any more than he can plead upon the minority of the first, or any particular heir, if, independent thereof, the prescription has taken place by forty years' possession against majors. The case of an entailed estate is, in this respect, no way different. Thus, if we suppose that the estate of Bargany had been taken up by some person who had no right to it under the entail, and that the true owner, who was unjustly excluded, lived forty years after that period, during twenty years of which he was under age, and that the next heir succeeding to this person lived twenty years longer, during ten of which he was under age, and was then succeeded by a person just born, who delayed his challenge till he attained thirty years of age, the action would still come in sufficient time in the nineteenth year after the first period of eviction ; because, deducting the years of the three successive minorities,

there would remain only thirty-nine years of clear possession available for prescription ; but if the challenge was delayed one full year more, prescription would operate. So far the matter is clear ; but the present case is entirely of a different nature, and the pursuer founds her plea of minority upon quite a different medium, viz., the personal *jus crediti*, which, by the nature of a Scots entail, is understood to belong to every heir called in the line of destination, whether the right of fee may have opened to one person or to another. But the personal *jus crediti*, which, by the law of Scotland, is a mere faculty, see 29th January 1789, *Wedderburn v. Colville*, does not carry along with it one particle of the fee, belongs, from the outset, equally without distinction, to all and every one of the heirs in the line of succession, whether remote or near ; and if we allow minority here to be a deduction, we have no choice but to admit it as to every one of them, no matter in what place he stands, and either to allow the minority of any one to be available to the whole, or to reject it altogether. It is said that each of them has a distinct right of action, and that they cannot be compared to a body corporate, and that it is a mistake to consider the right as of an indivisible nature. That heirs of entail are not a body corporate may be admitted. No such idea ever was entertained ; but the *jus crediti*, which belongs to the substitute heirs by the nature of a Scots

entail, is nevertheless a right which cannot be divided into parts, but belongs whole and entire to all and each of them. It is not like an estate falling to heirs-portioners, which is divisible, or a right of common which each man may acquire and lose for his own share. It must either be wholly preserved or wholly cut off, because it cannot be parcelled out into halves, or thirds, or any number of parts, among a variety of different persons. No instance can be found of such a right being partially saved or partially lost. If any one of the heirs brings his challenge within the years of prescription, he will save the estate to the whole. If no such action is brought, it will be lost to the whole; and in no case of that kind was it ever thought that the minority of one or more of the individuals would have an effect, *e.g.*, in cases of nuisance. If it could, there would be no such thing as applying prescription, either positive or negative, to such a case. It is said that, by the rule which the pursuer contends for, the prescription will never exceed sixty-one years. It is very true that, giving up one-half or more of the plea formerly maintained in the cases of Mackerston, &c., the term of prescription has, in the present argument, been limited and confined in that manner; but this is introducing a new and an arbitrary rule, founded upon no principle whatever, and calculated merely to serve the purpose of the present question. It is giving up the *jus crediti* al-

together as the foundation of it, and substituting another ground, viz., that of the succession having actually opened, although, in fact, no such opening has ever been either acknowledged or proved; and even if it had, the proposition must be wrong, as it limits the right of deducting minority within narrower bounds than would take place in a fee-simple estate. This is giving up the main point, and it also supposes that irritancies operate *ipso jure*, the contrary of which is true. It would be much more rational to say, that the minority of every substitute coming successively to be the nearest should be deducted, whoever is the pursuer of the action; *e.g.*, suppose, in the present case, Mrs. Fullarton had been prevailed upon not to bring any action at all, but that her grand-aunt, Mrs. Duff, had brought it, in order to preserve the succession, and bring it a step nearer to her, why should she not be allowed to plead Mrs. Fullarton's minority, if the minority of any substitute at all can be pleaded in such a case?"

17. The pursuer having then appealed to the House of Lords, it was Ordered and Adjudged, June 3, 1801, "That the interlocutors complained of be reversed; and it was declared and found, that the matters in the appellant's summons complained of are not sufficient to sustain the conclusions in those summonses, or any of the said conclusions, and therefore assoilzied the defender." LORD ELDON observed,—“Under these circumstances, and the situation

of the parties being as I have stated, the appellant brings her action of declarator, insisting, in her summons, that Sir Hew Dalrymple and his children, eight in number, who were before her in the estate, were gone; that John Hamilton had also forfeited for himself and his heirs; that the deeds to her prejudice should be reduced; and that, either as nearest or a remote substitute in consequence of the contraventions arising from the execution of these deeds, she had right to the estate, as if all the heirs prior to her were dead. The defender, in return, produced the Crown charter of 1742, and infestment thereon, followed by forty years' possession, insisting that this was a preferable right, sufficient to exclude any right the pursuer could set up. On the other side, it was contended that this was not a good title to exclude, because the appellant was entitled to deduct her minority from the currency of the forty years' prescription. This matter was very elaborately argued in the Court below, and your Lordships will recollect that it was treated at your bar most learnedly by the counsel in the cause, and very laboriously by myself, who had the honour then to appear before you as one of the present appellant's counsel. The majority of the Court thought that the appellant should be allowed to deduct her minority. Some of the judges were of opinion that she had a right to deduct, being nearest substitute; others, that such right was competent, both to the

nearest and most remote substitute,—some thought that no substitute was entitled to deduction of minority. Thus the first decree came before your Lordships. You will recollect that it was necessary to state Mrs. Fullarton's title, and it was stated such as I have represented it to you. It was alleged against her at that time that she had no title; but it was answered on her part, that it was the practice in Scotland to assume both the facts and the law in such a case. It is true, that if her facts necessarily determined the law in her favour, she might be allowed to assume both. But Mrs. Fullarton could not be allowed to say, Because my facts are good, I am therefore entitled to make what assumptions in law I please. This House at that time ventured to hold this language, that the parties had begun at the wrong end of the cause,—at least not at the English end. It was answered, that such was the practice of the Court. No person is less able to speak of the practice of the Court than I am, and I have lived long enough to respect old practices, though I should not be able immediately to give a reason for them. Two learned Lords agreed in opinion, that if the facts were true, and if the law, arising out of these facts, upheld the pursuer's title, it might then be necessary to enter into the defender's title. But it was very different to say that it was a title not to be departed from, that we should not enter into the appellant's title. The defender should not be allowed, on any short or

trivial point, to withhold the opening of his charter-chest. But if the title set out by the pursuer were, in fact, no title, it did not occur to me then, nor does it now, that there could be any inconvenience in going into a discussion of that title. If it appears that the pursuer has a title, then you may go into the defender's title. But why is the defender to be obliged to argue a plea in bar for ten long years, as in this case, if the pursuer has not stated a title to enable him to maintain the action ?

18. "The meaning of the remit by this House was, that the Court of Session should consider how far the title to pursue, set out by the pursuer, was involved with the title to exclude, set out by the defender. If the pursuer's title was invalid, of course they were not involved ; if there was a valid title in the pursuer, then they were involved. In that case, it was necessary to inquire into the pursuer's title, whether she was the nearest, or a more remote substitute, and whether she had a right to deduct her minority or not ; and if a contravention had been committed by the defender's authors, the Court was to consider what was the title of the pursuer by such contravention at this day. It was thus your Lordships' intention, that the Court should first consider if the pursuer had a title, and afterwards, if necessary, consider the exclusive title under the prescription. In this shape the cause went back to the Court, and I can scarcely find words to do justice to the elab-

orate consideration given to it in the Court below. Every question arising on this point has been searched to the bottom, and decided upon in fact ; but the cause has been returned here, with an interlocutor saying no more than that the exclusive title is good, which seems to admit that the pursuer had a title of some kind or other. But this is no answer to your Lordships' remit—no answer to the question, whether or not the pursuer has a title. You cannot imply, from this answer, whether a contravention has been committed or not—whether or not that contravention be purgeable—whether it can now be declared or not against the heirs of the alleged contraveners—whether the repudiation was a disposition or not—whether it was a contravention or not, and to be followed by forfeiture,—nor, whether any of the acts and deeds of Sir Hew or of John Hamilton were contraventions or not. The Court were all of opinion, either that there had been no contravention,—that such contravention was purgeable, or that no declarator could be brought at this time of day, and that the change of situation between the two prior heirs was no injury to the appellant, who stands precisely in the same situation as if no such change had taken place. They seem unanimous, with the exception of one Judge, who says nothing on the subject, that the pursuer had no title. With respect to the question itself, Whether the pursuer has a title or not ? I am free to state, that my mind is

strongly impressed with this, that if a person takes benefit by a deed, he has no right to alter what is directed by the disponent—*cujus est dare, hujus est disponere*. I will not say even this, that it could be deemed a futile provision, if a father were to say, that a second son should take before the first;—there might be grave considerations which induced a person to make such a disposition of his estate. I think, if it were *res integra*, it might be difficult to establish many of the doctrines contained in this case. After the most painful attention to this cause, and to the authority of the dead, as well as of the living, I cannot represent the pursuer to your Lordships as having a title. It has thus appeared to me to be my duty to detail the circumstances of the case, to shew, in my opinion, how the Court has failed in giving a proper answer to the remit; as, after the most anxious attention, I cannot be induced to think that Mrs. Fullarton has set out a sufficient title. I conceive it will be necessary that your Lordships should make some declaration upon the subject. I therefore submit to your Lordships that the interlocutors complained of ought to be reversed, and a declaration made, that the premises set out in Mrs. Fullarton's summonses do not sustain the conclusions of these summonses."

19. In the case of *MAULE v. MAULE*, March 4, 1829, the defender PLEADED against a claim founded upon an entailed assignation of a lease, that the lands had been

possessed upon fee-simple titles from 1734 to 1782, and that the entailed assignation founded upon was therefore extinguished by prescription. The pursuer PLEADED—That as his father was minor from 1740 to 1761, his minority must be deducted from the forty years which terminated in 1774; and, farther, that as he himself was minor from 1773 till 1794, his minority must also be deducted. In this case Baron Maule, the heir-substitute prior to the defender's father, died in 1781, and he had been major for forty years. The Court Found, "That the minority of the pursuer pleaded in this case affords no interruption, either negative or positive, as pleaded by the defender." LORD PRESIDENT HOPE observed,—"The pursuer pleads that his minority must be deducted,—that he was born in 1773, and from the death of Harry Maule in 1734 prescription had not run. He founds on the words of the Act, 'Minority of the party against whom the prescription is used and objected.' True, provided that prescription has not previously run against a person major during the whole course of it, and who was *in pleno jure et titulo* to have brought his action. Now Baron Maule was major, and the next substitute, and in *pleno jure* to bring his action; and therefore prescription was completed against him. It is nothing to the purpose that the present pursuer or his father were minors during part of that time. It is monstrous to say that a man's heir of entail shall have a plea not

competent to the man himself, and that after my right is prescribed against the true creditor, it may be cut down by his heir. Suppose a bond by A to B. B brings action on it; A defends on prescription. B was major the whole time, has nothing to reply, and A is assoilzied. Was it ever heard of, that B's heir could bring an action and recover, because he was minor part of the time? As to the pursuer being an heir of entail, that is nothing to the purpose. In fact he is not an heir of entail, properly so called. He is just the heir in a common *jus crediti* under a mere personal deed. But there is not one law for tailzies and another for fee-simple rights. If the creditor in an obligation or other deed was major for forty years, and brings no action, nor takes any document on it, it is cut off for ever, whether his heirs be heirs-at-law or heirs of entail. Heirs of entail in this respect are no better off than heirs-at-law; for in the case of Ayton it was found that a remote substitute who had a title to pursue, could not found on the minority of prior heirs. Now this could only be on the principle that he was *in pleno jure et titulo* during the whole time to have brought a challenge, which any remote substitute may do. The case here is still stronger. Baron Maule was not a remote substitute, having only a slight and contingent interest; he was next substitute, entitled to take the subject to himself—was himself major for the whole time, and therefore pre-

scription was fully run, and can never more be opened up; for it is not conceivable how a remote and contingent claim can be stronger than a direct and immediate one. Agreeably to this also are the cases of Gordon of Whiteley and Achyndachy, where prescription having run against the next substitute, remoter substitutes were not allowed to found on their own minorities in actions which they afterwards brought. So, whether regard be had to the positive or negative prescription, I am clear that the objection of the pursuer's minority does not apply; and therefore I am for sustaining the defences of prescription, both positive and negative, and for assoilzieing the defender."

20. LORD BALGRAY observed,—  
"The last branch of this cause relates to the point, Whether the pursuer is entitled to deduct his own minority from the course of prescription which is pleaded by the defender against him? This proceeds upon the supposition that the positive prescription is applicable to the case. This is a most important question. It is not only ingeniously, ably, but imposingly argued by the pursuer. Mature consideration, however, will satisfy any lawyer that it is not founded on correct principles. The Act 1617 was intended to 'quiet men's minds,' and to secure heritable property. It therefore ought to be interpreted and applied so as to attain that object. The Act 1617 never did or could contemplate entails, or the effect which would be given to them by the

Act 1685. It is therefore unreasonable that the utility of the Statute 1617 should be abridged *pactis privatorum*, or that there should be one law of prescription for entailed estates, and another for unentailed estates; or that prescription should operate differently *inter hæredes*, and between creditors and singular successors. The application of the Act 1617 to the cases of fee-simple estates is plain and simple, and how it is to be altered to the law of entailed estates, consistent with principle, it is not easy to discover. 'The plea of the pursuer seems to involve entailed property in an inextricable labyrinth of confusion and uncertainty,' as was well expressed by the late Lord Meadowbank. Principles seem to be acknowledged, even by the pursuer, that appear contradictory to his argument. 1. It is admitted that the minority of the whole substitutes or remote heirs is not to be reckoned, otherwise there never could, or at least hardly, be prescription of any entail. 2. That an heir cannot deduct the minority of prior heirs, as was found in the case of Ayton of Kinaldie. 3. That substitutes of entail have no real right in the subject, but merely a contingent right—a *jus crediti*, which is exactly the same in degree in every substitute, whether near or remote. From these principles, acknowledged on all sides, it necessarily follows, in my humble opinion, that in the case of entailed succession, in applying the doctrine of prescription, either the rules in fee-simple succession must

be adopted, or the plea of the pursuer must be admitted, that every substitute, when he comes to be in the state of a pursuer, is entitled to deduct his own individual minority. If this doctrine be admitted, it is necessary to consider the strange consequences which must be deduced therefrom. 1. It is obvious, that although an entail be a *jus individuum*, and must go *seriatim* to the persons designated by the granter, yet this *jus individuum* may be ineffectual as to one class and prescribed, and effectual and not prescribed as to another class. 2. If admitted to one substitute, on what principle can such substitute be debarred from pleading on the minority of prior substitutes? The principle is the same. The positive prescription is an *adquisitio domini*, on certain terms and requisites. It infers nothing against the claimant. 3. This plea is founded on a mistaken interpretation of the words of the Statute. The party against whom prescription is used and objected does not mean the immediate pursuer of the action, but the party against whom the prescription is running. This point is extremely well explained by Lord President Campbell in his speech in the Bargany cause, and also by the other Judges. 4. The words of the Statute are, that the years only 'during which the parties against whom the prescription is used and objected shall be counted.' If so, then according to the pursuer's interpretation, the years before the birth of an heir, who becomes a pursuer, as in the pre-



sent instance, should never be counted. 5. This plea gives up the *jus crediti*, and proceeds on the idea that the succession has opened, and in many instances will limit the doctrine within narrower grounds than if the estate was held in fee-simple. It is unnecessary to pursue the argument further, as it was so fully discussed and so well treated in the Bargany cause by Lord President Campbell, the late Lord Meadowbank, the late Lord Armadale, and Lord Glenlee. But, after all, let the merits of the argument lie where it may, yet there is now such a series '*rerum judicatarum*,' which has settled the point, that it would

be contrary to all just principles of expediency and utility to listen to any alteration. Prescription is founded solely on utility, and that is never to be lost sight of. The cases referred to are—1. M'Dougall of Mackerston, 12th July 1740; Kilk. *voce* Prescription, No. 5; Clerk Home, p. 206; Bank. 2, p. 163. 2. 24th June 1756, Children of Sir Samuel M'Lellan. 3. 1st December 1757, Gordon *v.* Maitland. 4. 21st December 1784, Gordon of Whiteley. 5. 23d November 1798, Case of Bargany. Upon these grounds, I humbly think that the pursuer's plea for deduction of his minority should be repelled."

## PRESCRIPTION ON DOUBLE TITLES.

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*Where a Party having right to lands under two titles, the one limited and the other absolute, completes his title under the latter, and possesses upon it for forty years, the former, although the preferable and governing title, is extinguished by prescription.*

### I.—M'DOUGALL v. M'DOUGALL.

**July 10, 1740.** IN 1669 an investiture of the lands of Mackerston was completed in favour of Henry M'Dougall in liferent, with power to alter, and of his son Thomas in fee. In 1684 Henry executed a bond of tailzie and procuratory of resignation in favour of himself in liferent, and his son Thomas in fee; whom failing, to certain substitutes, but under strict prohibitory and irritant clauses, limiting Thomas, and the whole heirs of tailzie, from burdening or alienating the estate, or altering the order of succession.

#### **NARRATIVE.**

In 1692 Henry died, and his son Thomas being already infeft under the investiture 1669, entered into possession of the estate. In 1702 Thomas died, leaving three sons, Henry, Thomas, and William, all of whom were under age, William, the youngest, not being of age till 1711. Henry, neglecting the entail 1684, made up titles to the estate under the investiture 1669. In 1715 he executed a bond of tailzie and procuratory of resignation in favour of himself and the heirs-male of his body; whom failing, to the defender, Barbara M'Dougall, his only

child. In 1722 Henry died, and was succeeded by the defender, who obtained a charter on the procuratory of 1715, and expedite an infeftment of the estate in terms of it. In 1738 her uncle, the pursuer, having served himself heir-male of tailzie and provision under the entail 1684, brought a reduction of the settlement made by his brother Henry in 1715. The defender resisted the action, on the ground, that as the investiture 1669 had been the sole title of possessing the estate since its date, her right upon that title was secured by the positive prescription, and that as no document had been taken on the entail 1684, the defender's right under that deed had been lost by the negative prescription.

M'DOUGALL  
v.  
M'DOUGALL.  
1740.

PLEADED FOR THE PURSUER.—When two titles to an estate concur in an heir in possession, prescription, neither the positive nor the negative, can run against one of these titles during the time when the title against which prescription is pleaded, as well as that in favour of which it is pleaded, are in the same person. A party cannot prescribe against himself. The Statutes introducing prescription clearly contemplate prescription as running between two parties, the one party having an interest that the right should be preserved, and the other that it should be lost. Where a party has more titles than one in his person none of them prescribe, he possesses upon them all. The law never intended that one title was to be set up against another. Such a doctrine is as absurd as if a man were to prescribe his right leg against his left, or one pocket of his coat against another. If this be not splitting of a hair, it is at least splitting of a person and making him fight against himself.

ARGUMENT FOR  
PURSUER.

The positive prescription is inapplicable, for positive prescription is the acquisition of the property of a subject by uninterrupted possession. But Thomas M'Dougall and his son Henry, who are supposed to have acquired by the positive prescription, were confessedly proprietors upon the tailzie 1684. It is therefore impossible to conceive how they could acquire the property of their own estate by prescription, or how they could acquire by prescription against their own heirs. Thomas could not by any act of his defeat the entail of 1684, which was founded upon a quality in his own title; nor can his negligence or pre-

M'DOUGALL  
v.  
M'DOUGALL.  
1740.

sumed dereliction be a foundation to destroy the deed which he could not defeat. He was not at liberty to choose upon which of the two titles he was to possess. The entail made by his father was binding upon him, his father's powers being a condition in his own infestment.

But even if the positive prescription were held to be applicable, it could not possibly begin to run till 1722, when Henry (2) died; because the pursuer could not have attained possession of the estate in consequence of the entail 1684, by any action brought during his brother's life, as the right of the fee, both by the investiture 1669 and by the entail 1684, stood vested in the same person. For the same reason the negative prescription could not begin to run till 1722, because until that time the same person was both debtor and creditor in the obligation. At all events it could not begin to run till 1692, when Henry, the maker of the entail, died, for as he reserved his own liferent, and also a power to alter, no one could claim upon it till his death.

But if prescription, either the positive or the negative, was to run in favour of Thomas from 1692, the years of his sons' minorities must be deducted, all of whom were minors till 1711. The negligence upon the part of the substitutes is said to be, that they did not bring an action against Thomas to compel him to possess upon the entail. But how is it possible, upon the words of the Statute, not to deduce the minority of those against whom the prescription ran? If prescription can run at all in this case, it must be deemed to run against the whole other substitutes, and, by consequence, the minority of any one of them must interrupt the prescription by the express words of the Statute.

ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—Prescription runs in favour of one right to the defeating of another right, which otherwise would have been preferable to it. In rights of property prescription runs neither for nor against persons, except in so far as persons have the title to such rights in them. There must be two opposite rights, otherwise there can be no prescription; but there is no necessity always to suppose an opposition and difference in persons. If a person has two rights vested in him,

but the one fuller and more beneficial than the other, it is his interest to take up that which is most beneficial, and it would be absurd to suppose that he would keep up the lesser right in order to operate against the fuller. If the person principally interested, and in whom the lesser right is immediately vested, thus neglects it, and leaves it in the hands of time to abolish it, there seems no good reason why such right should not be lost by prescription.

M'DOUGALL  
v.  
M'DOUGALL.  
1740.

There is no person to whom a right is competent, who has not also a remedy for attaining it. If, therefore, persons neglect the remedy that is competent to them, their neglect must operate against them. The silence therefore of the substitutes during the years of prescription, while nevertheless it was competent for them to have taken document upon the entail 1684, presumes a dereliction, and must induce the negative prescription against it as much as against any other right.

Prescription must begin to run from 1684, the date of the entail, because, from its date, there was always some person to whom it was competent to have taken a document upon the entail, such as suing for registration of it or completion of it by infestment. At all events, the heirs of entail might have compelled Thomas, when he succeeded his father in 1692, to expedite his infestment upon the entail, and so have prevented prescription running against the entail. The Act 1617, introducing the positive prescription, was intended to secure real rights and infestments upon lands when clothed with forty years' uninterrupted possession, so that all latent rights that might compete with them might be cut off. No distinction is made in the Act between competing rights being vested in different persons or in one and the same person. The main design of the Act was to give an absolute security to a right so possessed without challenge for forty years. If both rights being vested in the same person made any difference, the main end of the Statute, and the security arising from the records, would be entirely defeated, because such latent entails as the present might be brought out, even after centuries, to overturn the securities of property that had been peaceably enjoyed without any challenge during all that time.

Neither can the minority of the substitutes be deducted,

M'DOUGALL  
 v.  
 M'DOUGALL.  
 1740.

because it is only the minority of the person vested in the right that can operate against prescription, and if he is major, and silent upon his right during the years of prescription, the minority of the heirs expectant after him can operate nothing. If it were otherwise no prescription could ever run against latent entails, because where there are several branches of institutes, there must be a perpetual course of minorities, which would make the right altogether unprescriptible. Nor is there any foundation in law for holding that the minority of the first substitute only is to be deducted, as if he were the principal creditor at the time. The remoter substitutes are quite as much creditors as he, and their minorities ought equally to interrupt with that of the first substitute.

JUDGMENT.  
 July 12, 1789.

The Lords Found, " That the bond of tailzie 1684 having lain latent, and not having been claimed upon, or any document taken upon it for upwards of forty years from the date thereof, and the estate having been possessed by Thomas and Henry M'Dougalls, and Barbara M'Dougall, present possessor thereof, for upwards of forty years, in virtue of the disposition in anno 1668, and the infeftment following thereon, they have the benefit both of a negative and positive prescription ; and that the tailzie in anno 1684 cannot now be set up as a title of eviction of the estate from the said Barbara M'Dougall, notwithstanding that Henry and Thomas M'Dougalls, her father and grandfather, were heirs by the tailzie 1684 years, as well as by the disposition and infeftment 1668 : And found, That the minority of Thomas M'Dougall, or of William M'Dougall, could not interrupt the prescription, they being only substitutes by the tailzie 1684, and the right thereof not having devolved upon them during their minority : And found, That Thomas M'Dougall, pursuer in this process, cannot found on the minority of Henry M'Dougall his brother, in order to prevent the running of the prescription in favours of Henry M'Dougall himself, and Barbara M'Dougall, who derives right from him."

July 10, 1740.

The defender having reclaimed, upon advising petition and answers, after a hearing in presence following thereon, the Court " Adhered."

1. LORD KILKERRAN in his Decisions observes,—“As to the first objection to the negative prescription of *non valens*, the same was dropped; for a declarator was competent to any heir of entail, however remote. As to the objection to the positive prescription, that it could not run while the heir in possession had right by both titles; although, where the investitures of an estate are simple and absolute, there are no habile terms of prescription in such case, because no man can prescribe against himself; yet where an investiture contains limitations and restrictions, the heir in possession upon a different title, though likewise heir of the investiture containing the limitations and restrictions, may, even before the succession split, by the positive prescription, work off these restrictions. That the minority of the heir in possession could not be pleaded against himself, was also a clear point. And so far the Court was unanimous. But it was more doubtful whether the minority of the remoter heirs, viz., of the defender Thomas, and of his brother William, should not interrupt; for if not, then here would be a prescription incapable of interruption, if the minority of the heirs *in spe*, and whose interest it is to restrain the powers of the heir in possession, did not interrupt the prescription. On the other hand, it was thought no less inconsistent to suppose a prescription, and at the same time to destroy it by an hypothesis that would render it incapable ever to run; which must

in great measure be the case, if the minority of an heir, however remote, other than the heir in possession, should interrupt it. Upon which point the Court, by plurality of voices, found as above.” —*Kilkerran's Decisions*, p. 416.

2. LORD ELCHIES in his Decisions, under the date July 10, 1739, observes,—“The Lords repelled the nullity objected to the tailzie 1684, and the objection to the maker's want of power, and the prescription of his reserved faculty; but they found, *first*, The tailzie itself prescriptible even during the possession of Thomas and his son Henry M'Dougall, the defender's father and grandfather, notwithstanding the decision in the case of Dundonald; and I own I was of the same opinion, because I thought the case quite different, that in Dundonald's, William Lord Cochrane's infeftment, as it was the only true right to the estate, so it was unlimited, and no burden upon the heirs succeeding, whereas here Thomas's infeftment was the only, at least most proper title of possession, being the only legal right, and the personal tailzie was a burden upon them, and in the question of prescription must be considered as a debt due by them. But Arniston and others, who voted on the same side of the question, thought there was little or no difference betwixt the two cases, and that the decision in Dundonald's case was wrong. *Secondly*, They found it actually prescribed, notwithstanding the minority of Henry during Thomas's possession. Indeed, I humbly dif-

ferred in this. I thought the prescription could not begin to run till after the death of Henry the maker, and after his death I thought Thomas his son was debtor in the obligation, and his son was creditor, and when Henry the son succeeded, he became debtor and the pursuer creditor. And though I thought, where the first heir was major, the minority of remote substitutes might not perhaps be deducted, yet I thought the minority of the first heir behoved to be deducted from the prescription. Both these carried by the President's casting vote, but the other Lords voted differently in the two questions, and Strichen did not vote."

3. LORD ELCHIES, again, under date Nov. 27, 1739, observes,— "This case appears to me a very difficult one. *First*, As to the negative prescription, cases may be figured where to me it should seem absurd that there could be no prescription, *e.g.*, an estate possessed for a century by a line of heirs from father to son, without knowing of any destination to exclude the heirs-of-line, or any limitation upon them. If, when the succession opened to a female heir, a tailzie should appear in a third party's hand never before heard of, limiting the succession to a different line, perhaps heirs-male, either with or without restrictions, and when no possibility remained even to improve it, suppose it were forged. On the other hand, there may be destinations of succession never completed, and I doubt not there are several in

Scotland that could not be found prescribed without altering the succession from the course that all the proprietors intended, *e.g.*, where the succession is settled by contracts of marriage and other solemn deeds, and the parties neglect to expedite any infestment, but possess from father to son without making up their titles, I cannot think that such a settlement would be lost *non utendo*; no, not even in this case had Henry M'Dougall made no alteration, especially if he had died in the state of apparenacy, would not in that case the heir-male have been preferred (though the question had occurred after the years of prescription) to this defender, albeit the former investitures had been to heirs whatsoever. And yet the negative prescription is founded on the bare neglect of the parties having interest to take document upon the deed, and not upon any contrary positive act of the party who pleads it. Therefore, the difficulty is to determine upon principles of law when such destinations may prescribe, and when they cannot. *Secondly*, As to the positive prescription, I can hardly see *habile* terms for it. The use of it is to ascertain and secure the right or property of those who have possessed forty years, or, as the law calls it, *adjectio dominii*. (*Vide* the Act 1617.) Now, both parties acknowledge the property of all the preceding heirs, and each of their claims is founded upon it, and whatever of the contending parties prevail here will have the benefit



of these their predecessors' possession, and therefore I see not how their possessing or not possessing for forty years can influence the question, Who shall succeed to them? *Thirdly*, The difficulty to me appears no less with respect to deducting minorities. The negative prescription expressly supposes the negligence of the party interested in the right or obligation, and cannot therefore run during that party's minority; and the Act 1617 enacts that the prescription shall not run against whom it is used, plainly supposing, that in every case of prescription there is some person against whom it runs, as well as in whose favours. Now, who is this person? Is it the heir for the time in possession? Indeed, where there is only a simple destination of succession, he has, if not the only, at least the greatest interest, but then there is no use for prescription, for if he alters, that is effectual without prescription. If he does not alter, then I doubt the destination should not prescribe. But if there are limitations on the heir in possession, then surely these limitations are not in his favours, nor is it against him the prescription is used, as the Act 1617 expresses it, whose minority is to be deducted, and therefore it must be the minority of some of the remoter heirs. But supposing it were the minority of the substitutes, then *quære*, whether it is only of the first substitute after the heir in possession, or of all of them? If it is this last, then it is scarcely possible there can ever be a pre-

scription of such rights, and hardly even where the minority of only the first substitute is to be deducted. But as in the prescription of a bond or other obligation, only the minority of the creditor for the time falls to be deducted, however many substitutes he may have, so I should think that only the minority of the immediate first substitute for the time should in this case be deducted."

4. Again, under date December 5, 1739, LORD ELCHIES observes,—  
 "This case was well argued by the Dean of Faculty and Mr. Craigie for Mr. Thomas M'Dougall, and likewise by the Solicitor for the lady; but the two first differed. Mr. Graham argued against the positive prescription; but Mr. Craigie gave it up that there might be a positive prescription, of which I own I doubted for the reasons formerly mentioned. As to the prescription negative, as here there was no evidence that ever the tailzie was known to or in possession of Thomas or Henry M'Dougall, I thought there might be a negative prescription if there were no minorities, as to which Mr. Craigie gave up the minority of the last Henry during his father's life, because he afterwards made up his titles upon the old infetment. But he insisted upon the pursuer Thomas his minority as sufficient, counting the commencement of the prescription from 1692, when the first Henry died. I own I inclined to think that both minorities should be deducted, and I thought that Henry, endeavouring to defeat the

tailzie, or complete the prescription after he became in some sort debtor, that is, heir of the former investiture, cannot prejudice the next heir, or make that the prescription run during his former minority, where it did not run in law."

## II.—BRUCE *v.* BRUCE CARSTAIRS.

April 7, 1772.

NARRATIVE.

The lands of Kirkness, together with the Island of St. Seranus situated in the loch of Lochleven, were held by Sir William Bruce, under a charter 1682, from the Principal and Master of St. Leonard's College, St. Andrews, in favour of himself, and his heirs and assignees. In 1687 Sir William conveyed these lands to his eldest son John, and certain substitutes, under the fetters of a strict entail, and upon the disposition his son was infeft base. Sir William died in 1709, and was succeeded by his son Sir John, who died in 1711. Sir John was succeeded by his only sister Anna Bruce, who possessed on apparency. She died in 1715, and was succeeded by her son, Sir Thomas Bruce, who, in 1721, neglecting the deed of 1687, made up titles under the charter 1682, upon a precept of *clare constat* from the Principal and Masters of St. Leonard's College, as nearest and lawful heir to his grandfather, Sir William. Upon the death of Sir Thomas, his brother Sir John (2) also made up titles by precept of *clare constat*, as heir to Sir Thomas, and on that title he possessed till his death in 1766. The pursuer, his daughter, made up titles to him in the same manner as her father and uncle had done.

Upon his father's death the succession under the deed 1687 devolved upon the defender ; and he having claimed the estate, the pursuer brought a declarator against him to have her right determined.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—Although Sir Thomas's infeftment originally carried no more than the right of superiority, yet as that infeftment was *ex facie* an absolute good right to

the lands, without distinction of property and superiority, the full and absolute right to the whole was established by the possession of Sir Thomas and his brother upon that title for forty years. This is clearly founded on the Statute 1617. In order to complete a right by prescription two things only are requisite, viz., that the party possess in the character of proprietor for forty years, and that there be in his person a proper title of property, bearing date anterior to the commencement of the forty years. These two requisites clearly concur in the present case. Sir John and his brother having possessed the lands for forty years without acknowledging the right of any vassal, the full property of the lands became thereby vested in them by prescription, and the *dominium utile* was thereby as effectually extinguished and consolidated with the superiority as it would have been by a resignation *ad remanentiam* made by the vassal.

BRUCE  
v.  
BRUCE  
CARSTAIRS.  
1772.

An infeftment in the property, with possession for any period whatever, would not establish a right of the superiority, because that title is not broad enough to comprehend the superiority, and no person can acquire by prescription a right broader than his title of possession. An infeftment in the property carries only a right to the lands holden of the person from whom it flowed; but as infeftment in the superiority is *ex facie* sufficient to carry the whole lands, so possession of the property upon that title will establish a right to the whole by prescription.

If the late Sir John and his brother had been unlimited proprietors of the estate under both titles, there would not have been *termini habiles* for prescription, as nothing could have been either acquired or lost. But as he was laid under fetters and limitations by the deed of 1687, it is clear that by possessing on the unlimited title there was room for prescription. There was clearly an *adjectio dominii*, when in place of a limited he acquired right to an unlimited title. He did not prescribe a right against himself, but he acquired a right in favour of himself and his heirs-of-line against the heirs of entail, who were creditors in the obligation imposed on him by the deed of 1687, and who, by not insisting upon their right in due time, were cut out of it by the negative prescription.

BRUCE  
v.  
BRUCE  
CARSTAIRS.  
1772.

When a person has sundry titles to a subject, all of which are absolute and unlimited, none of the remoter heirs have a title to pursue under these settlements but the heir in possession. They are creditors to him in nothing. They have nothing to demand of him. He is unlimited proprietor of the estate, and can do with it what he pleases. But when the heir in possession is laid under fetters and limitations by the settlements of the estate, then all the substitutes are creditors to the heir in possession in these fetters and limitations, and action lies at their instance against the heir in possession for implement. The remoter heirs in this case had no reason to challenge Sir Thomas Bruce and his brother for what they did, but for what they did not do. They acted right in making up their titles to the superiority, but they ought not to have stopped short there. They ought to have completed their titles to the property, and after consolidating the two, they ought to have resigned for new infeftment in terms of the tailzie. It is plain that an action was competent at the instance of every substitute of the entail for that purpose.

ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—The base infeftment of Sir John Bruce denuded Sir William of the fee of property of the lands of Kirkness and St. Serffs, and vested the same in his son John. No more than the bare superiority, therefore, remained with Sir William, and consequently no more was *in hæreditate jacente* when he died.

The precepts of *clare constat* granted by the Principal and Master of St. Leonard's College to Sir Thomas Hope or Bruce and his brother Sir John, could carry no more than the superiority, because that was all that remained *in hæreditate jacente* of Sir William. The Principal and Master of St. Leonard's were the superiors of Sir William, but they were not the superiors of Sir John's base infeftment, and therefore they could not grant any renewal of that infeftment. Sir Thomas and his brother were therefore infeft in the superiority, but were apparent heirs only in the property.

The question therefore is, To which of these two titles is their possession to be ascribed? Is it to be ascribed to the title which gave a just and legal right to the rents, or to the

other title which could give no such right? During the whole period of their possession they were apparent heirs under the deed 1687, and as both titles were united in the same person there were no *termini habiles* for either the positive or the negative prescription. Their possession must be ascribed to both titles, so as to preserve both entire when the succession should come to divide.

BRUCE  
v.  
BRUCE  
CARSTAIRS.  
1772.

Every idea of prescription necessarily supposes two persons to be parties thereto, and two independent separate rights, the one to be acquired and the other to be lost. When both titles coincide in the same person, which thereafter come to divide, it seems adverse to reason, as well as to every principle of law and justice, that the one right should be set up to combat the other, in order thereby to establish a prescriptive right in favour of the one title against the other during the period that both titles were united in the same person.

It is a principle equally applicable both to the positive and the negative prescription, that *contra non valentem agere non currit prescriptio*. Prescription necessarily supposes that there must be some person having both title and interest to interrupt it. So long, therefore, as the party principally interested is disabled from prosecuting his right, either by natural causes, such as minority, or by any other obstruction, it would be the highest injustice to deprive him of his right *in pœnam* of a supposed negligence and inattention. When the party in possession is vested with both titles, being both heir-of-line and heir of provision, the remoter heirs of provision are *non valentes agere* in the strictest sense. They have neither title nor interest to remove the heir in possession, or to compel him to say to which title he ascribes his possession. If he has a double title he will ascribe his possession to both or either, and when the titles come to separate, the heir in the one title will not be permitted to plead the positive prescription in bar of the other, by ascribing the possession held under both titles to the one in preference to the other. If it is necessary to ascertain to which title the possession ought to be ascribed, it will be ascribed to that title which is the preferable right.

Where a superior infeft gets into possession, and holds lands unchallenged for forty years, he may thereby reacquire the

BRUCE  
c.  
BRUCE  
CARSTAIRS.  
1772.

property from his vassal by means of the positive prescription, and consolidate the property with the superiority. His possession must, in such case, necessarily be ascribed to his infeftment in the superiority, because he has no other title to which it can be ascribed. But it is impossible to ascribe the possession of Sir Thomas Bruce and his brother to their infeftment upon the precept of *clare constat*, as that infeftment took up the superiority only, the property continuing to be possessed by them on apparency, as heirs under the deed of 1687.

JUDGMENT.  
Dec. 6, 1770.

The Lords, "In respect of the infeftment in the person of Sir Thomas Bruce on the precept of *clare* 1721, and of the possession of the island of St. Servanus upon said infeftment for more than forty years, Found that the pursuer, as heir of Sir John, has right to said island in virtue of the positive prescription."

House of Lords.  
April 7, 1772.

The defender having appealed to the House of Lords, "It was Ordered and Adjudged that the interlocutor complained of be Affirmed."

*Where a party having right to lands under two titles, the one limited and the other absolute, does not complete his title under either, but possesses on apparency for forty years, the former is not extinguished by prescription, but remains the preferable and governing title.*

#### WELSH MAXWELL v. WELSH MAXWELL.

July 29, 1814.

NARRATIVE.

IN 1742 Alexander Welsh executed a strict entail of his estate of Skarr in favour of his nephew, William Welsh, and the heir-male of his body; whom failing, to another nephew, Robert Hamilton, and the heir-male of his body; whom failing, to certain other substitutes.

The entail specially provided that William Welsh, and the heirs of his body, should be obliged to make payment of all the

entailer's debts ; and by his will the entailer conveyed to him his whole moveable estate. The entailer died in 1748, when he was succeeded by William Welsh, who neither feudalized the entail, nor made up a title to the estate as heir-of-line to his uncle, but possessed the estate upon apparency. In 1773 John Coltart, acting as trustee for William, obtained decree of adjudication against him proceeding upon a special charge on account of the debts due by the entailer, and which had been constituted against William as representing his uncle. No titles were expedite on the adjudication, and on the death of William Welsh, who executed no alteration of the entail, Mr. Coltart in 1786 made over the decree of adjudication to David Newall in trust, for William's son John. In 1788 Mr. Newall transferred the decree to John and his heirs and assignees, by a deed containing a special destination different from that in the entail. In 1789 a Crown charter was expedite on this deed in favour of John, which was followed by infeftment also in his favour in 1793.

WELSH  
MAXWELL  
v.  
WELSH  
MAXWELL.  
1814.

John having died without heirs of his body, he was succeeded by his brother William, who died in 1800. The succession under the entail then opened to the pursuer as the heir-male of Robert Hamilton, the second substitute in the entail. The pursuer expedite a general service as heir of tailzie and provision to William Welsh, the institute in the entail, whereby he carried right to the unexecuted procuratory in the entail, and in virtue of that procuratory he obtained a charter of resignation, and was infeft. He then raised a reduction of the adjudication obtained in 1773, and also of the Crown charter of adjudication expedite in 1789, and the infeftment which followed thereon in 1793. Under these titles the defender, Mrs. Jane Welsh, sister of the two last heirs in possession, and the heir-of-line of the entailer, claimed the estate. Her defence to the action was, that the entail founded on by the pursuer was extinguished by the negative prescription.

PLEADED FOR THE HEIR OF ENTAIL.—The question at issue is, Does the estate belong to the heir of the entail, or to the heir general of the last possessor ?

ARGUMENT FOR  
HEIR OF  
ENTAIL.

The entail became the *lex feudi* by which the future succes-

WELSH  
MAXWELL  
r.  
WELSH  
MAXWELL.  
1814.

sion was to be determined. By the limitations of the entail a *jus crediti* was created in favour of the substitutes. When anything was done to violate the obligation constituted in their favour, any one of the substitutes might have brought an action to enforce the observance of the obligation. But until something was done in violation of their right, the hands of the substitutes were completely fettered. Until then there existed no legal ground of challenge on which they could have "taken document." In other words, they were *non valentes agere cum effectu*. This *non valentia* could only have been removed by either of two events. It might have been removed, *first*, by the heir in possession completing a feudal title in some character different from that which belonged to him as heir of entail; or, *second*, by the failure of those members of the entail who were also heirs-of-line of the entailer, and by the subsequent possession of the estate by their heirs or assignees. The first of these events never did take place, unless the charters of adjudication and infeftment in 1793 are to be considered as of that description, but, besides, the plea of prescription can obtain no aid from an operation so recent. The other event did not take place till the death of the last heir. Till then there existed nothing actionable at the instance of the substitutes, nothing that required a legal remedy. Till then, therefore, there were no *termini habiles* for the commencement of a course of negative prescription against the heir of the entail.

The principles of decision in the cases of M'Dougall, and of Smith and Bogle *v.* Gray, and Durham *v.* Durham, give no countenance to the doctrine that possession or mere apparency could become the basis of the negative or the positive prescription. To work off the restrictions of a limited title, no possession can be available but such as has followed upon unlimited titles completed in due form.

But although the fetters of the entail might be worked off by the course of the negative prescription, it by no means follows that the destination should also perish. As the destination has never been altered, it must remain in full force as the regulating law of the descent of the estate, while the conditions and provisions by which the destination is protected, being an obligation on the heir not to alter, may have been extinguished.



The negative prescription has an exclusive reference to cases where there is a *jus crediti et debiti*,—where there is an obligation which may be the foundation of an action against the obligant. It is not therefore like the positive, a mode of acquiring property, but a mode of extinguishing obligations, or removing encumbrances.

WELSH  
MAXWELL  
v.  
WELSH  
MAXWELL.  
1814.

PLEADED FOR THE HEIR-OF-LINE.—If a party have two unlimited rights in his person, and take infeftment upon one of them, although possession has followed for forty years, he cannot plead either the positive or the negative prescription, because both rights are unlimited. The principle of this rule is, that the heirs in the simple destination had no right or interest to call upon the possessor to complete his title under that destination, it being in the power of the possessor to alter the destination when he pleased. If, again, a party possessing have two titles in his possession, one of which is limited and the other is unlimited, and if he takes infeftment on the unlimited title, and possesses upon that title for forty years, he may plead both the positive and the negative prescription. He may plead the positive, because possession must be ascribed to the unlimited title. He may also plead the negative, because the heir under the limited title having a proper *jus crediti*, neglected to follow it and take document upon it. If, again, a party have two titles in his possession, the one limited and the other unlimited, and he does not take infeftment upon either, but possesses upon apparence for forty years, when the succession comes to split by the heir becoming different in the different titles, he cannot plead the positive prescription, because he has no prescriptive title. But he may plead the negative prescription, because the heirs in the limited title have a clear *jus crediti* and an undoubted interest to oblige the heir in possession to expedite charter and sasine upon the limited title, and having neglected to enforce these rights, the rights have been extinguished by the negative prescription.

ARGUMENT FOR  
HEIR-OF-LINE.

In the present case any heir of entail could have brought an action against the heir in possession to compel him to complete his title under the entail. It was of no moment that the entail did not specifically enjoin the heir in possession to make up

WELSH  
MAXWELL  
v.  
WELSH  
MAXWELL.  
1814.

titles, and no defence to the action founded upon that circumstance would have been sustained.

The doctrine, that as the heirs in possession did nothing to counteract the entail, the substitute had no occasion to sue for implement of the entail, is confuted by the words of the Statute regarding negative prescription. In every question concerning the negative prescription, the inquiry is, not what the debtor but what the creditor in the obligation has done? If the creditor has neglected to follow his right within forty years he is cut off by the negative prescription, whether the debtor has done anything to counteract the obligation or not. If, indeed, the debtor does something in direct opposition to the obligation, he secures himself by the positive prescription. But this is altogether independent of the negative. The one is a *modus amittendi dominii*, the other a *modus acquirendi dominii*, and each has a distinct and independent operation.

If the negative prescription has any application to this case, it must cut down the destination as well as the fetters of the entail. They are inseparable parts of the same deed; and the peculiar destination is in fact and in law one of the most important and distressing fetters. There is no solid ground for authorizing a distinction between these two objects of the deed. But to make way for the operation of the negative prescription in any degree, it is necessary to ascribe the possession of the successive heirs to their title as heir-of-line, and not to their personal right under the entail; and if this point be conceded, the entail must of necessity have perished *in toto*.

Interlocutor of  
Lord Ordinary,  
Jan. 15, 1805.

LORD ARMADALE, Ordinary, "Sustained the defences of the negative prescription pleaded by the defender, Mrs. Jane Welsh Maxwell, as heir-of-line of Alexander Welsh, her grand-uncle, against the personal deed of tailzie executed by the said Alexander Welsh in 1742."

Interlocutor  
of Court,  
Jan. 22, 1807.

The pursuer having reclaimed, the Court "Altered the interlocutor of the Lord Ordinary reclaimed against, repelled the defence of the negative prescription, and sustained the reasons of reduction."

OPINIONS.  
Faculty  
Collection.

In the Faculty Report it is stated,—“A majority of the

Court differed in opinion from the Lord Ordinary. They considered that the entail was the *lex feudi*, the only title under which it was lawful, and under which it must, therefore, have been the presumed intention of the heirs to possess. Their possession must, of course, be ascribed to their right under the entail. No act had been committed in contravention of its terms, which could authorize the legal interposition of the heirs,—no change even of the destination had been attempted,—and there was no obligation to make up feudal titles under the entail within a specified time. The only object of an action at the instance of the heirs would have been, to have it formally declared that prescription was not running,—a proceeding which the law did not require.”

WELSH  
MAXWELL  
c.  
WELSH  
MAXWELL.  
1814.

The defender having now reclaimed, the Court “Adhered.” June 21, 1808.

LORD HERMAND.—“I am for altering. Party did all he could to be free of the tailzie. Limitations confessedly are worked off. I cannot enter into the notion of the destination being entire. No such thing was found in Durham’s case. The principle there was, that both destinations were unlimited. There is no need of a contrary act by the possessor. The substitutes were *valentes agere*. They had an interest and a title to preserve their right. In the negative prescription there is no need of a title, as recognised in Inverleith’s case.”

OPINIONS.  
MS. Notes,  
Baron Hume’s  
Session Papers.

LORD NEWTON.—“I am for adhering. This party by possession could not work off the destination, though he might the fetters. It was the *lex feudi* till a new settlement was made. But main ground of our judgment was this, that the tailzie imposed no special obligation to possess on that title. If he had been challenged his answer would have been good, that he had not made up any other title. True, if he had followed up the advice he got, and got charter and sasine of adjudication, that would have done, but he did not.”

LORD JUSTICE-CLERK HOPE.—“Petitioner’s plea fails in point of fact. There is no evidence or indication that he possessed as heir-of-line. This is not to be presumed, and the thing is not shewn.”

LORD MEADOWBANK.—“I see no ground on which to dispute

WELSH  
MAXWELL  
v.  
WELSH  
MAXWELL.  
1814.

that the heir possessed on both titles. He did nothing to prefer the one title to the other. By possessing as he did, he became personally liable to fulfil the tailzie. If so, there was no *valentia agendi*, for inhibitions would have been competent at the instance of the substitutes to secure the obligation. I am therefore for adhering on this ground, that he was possessing on both titles, and had done nothing to attribute his possession to the unlimited title."

LORD ARMADALE.—"*First*, Can there be a negative prescription without positive? I think there may. An obligation to make an entail may prescribe. It has been found expressly that both applied. I think that the negative applies in this case, which is partly (and such often occurs) a deed of tailzie and partly an obligation. *Second*, Has there been possession here on the tailzie? It is said that a party is held to possess on all his titles. True; in order to defend his right he is allowed to plead all his titles. But quite otherwise where these titles are of different degrees of benefit. The same form of possession entitles him to ascribe his possession to the most advantageous title, when the question comes to be about the condition of his right, provided he has done nothing repugnant to it. Now, here no use was made of tailzie, by service or otherwise, to fix him down to the tailzie. Law will not by prescription hold the contrary. That he is contravening the predecessor's will is no reason why he should not be held to do so. As to *non valens agere*, for want of a special clause obliging to possess on that title, such clauses are new things, and not necessary, for the obligation attaches of itself, and the heirs of tailzie, without such clause, could compel him to make up a title to it. It would not have been a good answer that he was possessing on personal deed. The substitutes had right to insist for investiture. I cannot go into the notion, that the deed subsists as to succession and not as to limitations. My notion is that he possesses as heir, and not on the deed at all."

LORD CRAIG.—"I agree with Lord Armadale. The entail is worked off by the negative simply. In one sense a party possesses on all his titles, but in another on the most beneficial only."

LORD BANNATYNE.—"There are situations where positive and

negative prescriptions concur. But that is not universally true nor applicable here. If I have a right to my estate—all matters of obligation are worked off by the negative only. Such is the obligation to effectuate this tailzie. I cannot ascribe possession to the tailzie, because apparency, *quod* heirs of line, is as good a title of possession as the deed of tailzie. The substitutes were *valentes agere*. For they might have compelled him to invest on the tailzie. There was no need of an express clause to that purpose, *inest de jure*, from the nature of the thing."

LORD GLENLEE.—"Where both titles remain in *nudis finibus*, and nothing is done in pursuance, or towards implement of either, I see no grounds on which to ascribe the possession to one title more than another. I must ascribe it to both. It is a case of indefinite possession."

LORD MEADOWBANK.—"I consider farther, that the only right and lawful title was the tailzie. Are we, then, to ascribe possession to an improper and unlawful title?"

LORD PRESIDENT CAMPBELL.—"I observe that this person, William Welsh, was institute and disponee under the deed of tailzie. If he meant to have possessed otherwise, he must have been served and infest to enable him to provide widow and children or borrow money. He took no step of that sort. At the end of twenty years he advises with counsel how to get rid of it. If he had followed that advice, and got charter and sasine, he might have evicted the estate. The question is, Is tailzie lost by negative prescription? Such a thing may be, especially in a case of obligation to make a tailzie. But here, where tailzie is made, and the heir of tailzie succeeds, it is difficult to say that negative prescription will extinguish it. If persons not called by tailzie had succeeded and possessed—if things had been done which tailzie prohibited—that might have done. But none of these things occur here. Nothing is done at all that is repugnant to tailzie. Substitutes were not called on to do anything for their interest, as nothing was done against it. I do not, at the same time, rest much on the want of a *special clause* ordering to possess on that title. The thing is implied; but as no particular time for making up titles is implied by the law, the substitutes could not have prevailed in

WELSH  
MAXWELL  
c.  
WELSH  
MAXWELL.  
1814.

WELSH  
MAXWELL  
v.  
WELSH  
MAXWELL.  
—  
1814.

any action for that purpose. If such action had been brought, it would have served only to interrupt the negative prescription, and it is settled that a person need not pursue for purpose of interrupting only. That was the principle of the judgment in Dalhousie's case. On that principle I go here. An action by substitutes would have been nugatory. The heir would have answered well, that he was at least possessing on *all* his titles. A great deal of argument here, as to separation of destination and limitations. Such cases do happen, as where an heir of tailzie omits limiting clauses. But there is no need of going into that."

MS. Notes, Sir  
Hay Campbell's  
Session Papers.

On the Session Papers Lord President Campbell has written, — "Interlocutor right. William Welsh, the nephew, was direct disponee and institute under the tailzie, and had no occasion to make up any other title. Nothing done by him against the tailzie, and no room for commencing the prescription earlier than 1793. Even then there were only some steps taken to make up a title upon the debts which the heir of entail had a right to keep up against the estate. Settlement never altered. See Snodgrass, 16th December 1806."

House of Lords,  
July 29, 1814.

The defender having appealed to the House of Lords, "It was Ordered and Adjudged that the interlocutor complained of be Affirmed."

In the case of LUMSDEN v. BALFOUR, June 13, 1811, affirmed in the House of Lords March 14, 1816, the entail was executed in 1753. On the death of the entailer in 1758, he was succeeded by his eldest son James, who possessed upon apparency till his death in 1764, when he was succeeded by his brother John, who, in 1769, executed a postnuptial contract of marriage, in which he

took no notice of the entail, and altered the destination contained in it. In 1776 he made up titles as heir-of-line of his father by a general service and precept of *clare constat*. In 1803 he died, and the defender, who was his heir-of-line, but not heir under the entail, made up titles as heir-of-line to him, and at the same time permitted his brother, who was entitled to succeed under the entail,

to possess the lands. The pursuer, who was the heir-substitute next in order to the defender's brother, brought an action to have it declared that the estate belonged to the defender's brother, and that the titles made up by John Lumsden, the entailer's second son, and also by the defen-

der as heir-of-line, should be reduced. The Court "Sustained the pursuer's title to insist in the action, and found that the defender had produced no sufficient title to exclude." The defender having appealed to the House of Lords, the judgment was affirmed.

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*Where a party having right to lands under two titles, both of which are unlimited but contain different destinations, neglects the one last in date, and completes his title under the other, the former remains the governing title, and is not extinguished by prescription.*

I.—GRAY *v.* SMITH AND BOGLE.

June 30, 1752.

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II.—DURHAM *v.* DURHAM.

Nov. 24, 1802.

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III.—SNODGRASS *v.* BUCHANNAN.

Dec. 16, 1806.

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1. The cases of GRAY *v.* SMITH and BOGLE, DURHAM *v.* DURHAM, and SNODGRASS *v.* BUCHANNAN, are given in Volume Second, pp. 577, 582, and 588. In reference to the first of these cases LORD MONBODDO observes,—“In this cause several questions occurred: *First*, It was debated, Whether, in the case of a man's disposing his estate to his son, and a certain

series of heirs, without any infestment following upon it, a proper title could be made up to such a right by a general service to the father, the disponent, and not to the son, the disponent? and the Lords were unanimously of opinion that such service was inept; and as this was the pursuer's title in this case, they found that before extract he must produce a proper

service to the son, the disponent. *Secondly*, It was debated, Whether a man having a right to an estate by two different titles, one as heir of the investiture, the other as heir by particular tailzie or disposition, and choosing to make up his titles as heir of the investiture, neglecting the disposition, he can, either by the positive or negative prescription, acquire the fee-simple of the estate to him and his heirs whatsoever, so that the particular tailzie or disposition shall become null and void? And with respect to the negative prescription, the Lords were all of opinion that it could not run except from the time that the succession divided betwixt the heirs of the investiture and the heirs of tailzie; because a man having several titles to an estate may impute his possession to any of them he pleases, and his choosing to complete one of them by infestment will never be understood as passing from the rest. And in this manner many estates in Scotland are possessed upon sundry different titles, without its being ever understood that any of them could be lost by prescription, while the possessor of the estate had a right to them all; besides, that in such a case as the present, where the tailzie was alterable at pleasure by the heirs of the investiture, there was nobody against whom the prescription could run, because the substitutes in the tailzie were not *valentes agere*, at least *cum effectu*, because they could bring no effectual action to oblige the heirs of the investiture to execute a tailzie which they

could alter next day: and here lies the difference betwixt this case and the case of Mackerston, where the Lords found that the prescription could run. See the case, 5th December 1739. As to the positive prescription the Lords were divided in opinion; Lord Drummore and some others were of opinion that the heir of the investiture might, by the positive prescription, acquire the estate *tanquam optimum maximum*, so as to make it in every respect a fee-simple to the effect of its continuing in that series of heirs without regard to the provision of the tailzie. This opinion they founded chiefly upon a decision marked by Fountainhall, 31st December 1695, *Innes v. Innes*, where this was decided *in terminis*; and the like they said was decided in the case of Mackerston. But my Lord Elchies and the majority of the Lords were of opinion that the positive prescription in this case could not take place, because prescription was *adjectio domini per continuationem possessionis*, which could not be in this case, where the heirs of the investiture had already the property. It is true, they said, if the entail had laid the heirs of the investiture under limitations, that they could not alter the succession, or any other restrictions: then the positive prescription might take place in so far that it would give the property full and absolute without any limitations or restrictions: this was certainly the case of Mackerston, and, they believed, also the case of *Innes v. Innes*,



though not mentioned in the decision. But, with submission, there does not seem to be any foundation for this distinction; for if the possession for forty years in the one case will make a property so absolute that it shall be in the power of the proprietor to dispose of it as he pleases, there is no reason why, in the other case, it should not have a less effect, that of making the estate go in the same series of heirs without any act or deed of the proprietor, and so make the property in both cases absolute and unlimited. The positive prescription, therefore, should either take place in both cases, or, what I think the truer opinion, should take place in neither, and free the possessor from the obligation of the tailzie no more than from any other personal obligation."

2. LORD MONBODDO farther observes,—“In this case, as well as in the case of Mackerston, an estate was evicted from a series of heirs who had possessed for above eighty years upon a deed of settlement that was eighty years old, and had lain latent all that time, and which may have been liable to many nullities, such as deathbed, (which there was great reason to suspect in this case,) or even forgery itself; and if a man cannot be secured against such deeds neither by the negative nor positive prescription, no proprietor of lands is safe, but there is no more to do but to forge

a deed of settlement and date it 100 years ago, so that it will be impossible to detect the forgery; and if there are no irritant or resolute clauses in it, then neither the negative nor positive prescription will operate against it. LORD ELCHIES said, he was as great an enemy as any man to such latent deeds, but he did not think this a latent deed. To obviate such inconvenience, I would propose, that a man having several rights to the same lands in his person, descendible to several heirs, should, by making up titles to only one of the rights, be deemed to repudiate the others, so far as concerns the line of succession, and to will and declare that his succession should be according to the destination of the right which he has completed, in the same manner as if he had expressly revoked all the other destinations. This would remedy the inconvenience, put the thing upon a clear and solid foundation, avoid all intricate questions about prescription, and save to every man all his different titles to lands to be used by him as there is occasion. These principles will apply to the present case, but not to the case of Mackerston, where the party, being bound up by a strict entail, which he could have been obliged to execute, and could not afterwards alter, had no will in the matter.”—*Supp.* vol. v. p. 790.

*The Dominium Utile may be consolidated with the Dominium Directum by prescriptive possession of the former following on a title to the latter ; although the effect of the consolidation may be to bring the former under the fetters of a strict entail.*

I.—LORD ELIBANK *v.* CAMPBELL.

Nov. 21, 1883.

NARRATIVE.

IN 1760 Patrick Lord Elibank was infeft, in fee-simple, as Crown vassal in the lands composing the barony of Ballencrieff. In the same year he granted a disposition, *ex facie* absolute, of part of these lands called Stantalane, to Samuel Mitchelson, who took infeftment on the precept, and immediately thereafter executed a reconveyance, with procuratory and precept, in favour of Lord Elibank, and the heirs succeeding to him in the lands and barony of Ballencrieff ; whom failing, to his other heirs and disponees whatsoever.

Lord Elibank never took infeftment on the precept, or resigned on the procuratory in Mitchelson's reconveyance, but in 1776 he executed a bond of tailzie and procuratory of resignation of all the lands and barony of Ballencrieff, comprehending *per expressum* the lands of Stantalane. The destination was to himself and the heirs-male of his body ; whom failing, to his brothers *seriatim*, and the heirs-male of their bodies respectively.

Lord Elibank recorded this deed in the Register of Tailzies in 1777, but he did not make up a title under it. He died without lawful issue, and was succeeded by his brother George Lord Elibank, who, in 1778, expedite a general service as heir of tailzie and provision under the deed of entail, and in 1779 he was infeft on a charter of resignation proceeding on the procuratory of entail. He died in 1785, and was succeeded by his nephew Alexander, who, in 1786, expedite a special service as heir of tailzie and provision under the investiture of 1776, and he was infeft in the barony of Ballencrieff. He died in 1820, and was succeeded by his son Alexander, who, in 1821, was infeft in the barony, having also expedite a special service as heir of tailzie and provision under the same investiture.

In 1829 Alexander (2) conveyed the lands and barony of Ballencrieff to Patrick Campbell, as trustee, with full powers of

sale, in order to pay his Lordship's debts, and infestment followed on this conveyance. In 1829, his Lordship entered into a minute of sale of the lands of Ballencrieff with William Purves. Mr. Campbell, the trustee, subscribed the minute of sale, with a declaration that he approved of it, but his Lordship died without executing any disposition or procuratory.

LORD  
ELIBANK  
v.  
CAMPBELL.  
1833.

On his death, Alexander (3) after expeding a general service as heir of entail, raised a reduction and declarator against Messrs. Campbell and Purves, for the purpose of setting aside the trust-disposition to Campbell and his infestment, and also the minute of sale to Purves, and to have it declared that he had the only good right to the lands as heir of entail.

One of the questions raised in the action was, Whether the *dominium utile* of the lands of Stantalane fell under the entail?

PLEADED FOR THE DEFENDER.—At the date of the entail, the entailer was feudally vested in the superiority of Stantalane. Mitchelson had never been feudally divested of the *dominium utile* of these lands, and Lord Elibank had only a personal right to the *dominium utile* under Mitchelson's reconveyance. If his Lordship wished to entail the *dominium utile* as well as the superiority, he might have consolidated them, by a resignation *ad remanentiam*, or he might have bound his heirs of entail to make up titles to the *dominium utile*, and entail it. But he did neither of these things. He executed a naked procuratory of resignation, which could not include the *dominium utile* as it stood, and he must be presumed to have known such to be the legal effect of that deed. It was true that the lands of Stantalane were expressly included in the procuratory, but this was necessary, even if he only wished to entail the *dominium directum* of these lands in which he was infest, and had desired, *ex proposito*, to leave the *dominium utile* on a fee-simple title. In these circumstances it must be held that it was not even his Lordship's intention to entail the *dominium utile*; and it was certain that it was not aptly included in the entail.

ARGUMENT FOR  
DEFENDER.

Mitchelson's reconveyance disposed the property to Lord Patrick, and his heirs succeeding to him in the lands and barony of Ballencrieff. Every heir-apparent of the barony of Ballencrieff was therefore at the same time heir-apparent of the fee-

LORD  
ELIHANK  
v.  
CAMPBELL.  
1888.

simple title to the property of Stantalane. Mere apparency was a good title of possession; and all acts of possession by the heirs of entail might be imputed to their apparency. But farther, the general service of Lord George, as first heir of entail, would have been a good warrant, if produced to a notary, to authorize him to infeft Lord George under the open precept in Mitchelson's reconveyance, as it shewed Lord Patrick to have died without issue, and Lord George to be the heir succeeding him in the barony of Ballencrieff. Thus the service of Lord George, and each successive service as heir of entail of Ballencrieff, took up the personal right to the fee-simple property of Stantalane, and this was a still better title than mere apparency, to which all the acts of possession by heirs of entail, so far as regarded the *dominium utile* of Stantalane, might be ascribed.

Each heir of entail, therefore, had vested in him a right under the entail to the *dominium directum*, and a right under Mitchelson's reconveyance to the *dominium utile* of Stantalane. But though it should be held that the entail included the *dominium utile* of Stantalane, *ex figura verborum*, and that Lord Patrick intended this, and had imposed a personal obligation on the heirs of entail to implement his intention, still the only result would be, that there was a double title to the *dominium utile* in the person of each heir.

Having two titles, it was for the interest of the heirs to possess upon the unlimited, rather than on the limited title. They incurred no irritancy by merely delaying to make up a feudal title to the *dominium utile* and entail it. Nor did they run any risk from Mitchelson or his heirs; and certainly not more than they must have done by possessing the *dominium utile*, as the pursuer alleged they did, on the inept entail, so long as prescription was running. Before that term had run, Mitchelson was dead, and no party, through the heirs of Mitchelson who never possessed, could have reached the subject. Mitchelson's heirs were bound by his disposition to Lord Patrick, the entailor; and they could not be effectually charged by any creditors to enter, seeing that the disposition contained procuratory and precept.

In these circumstances there was no room for prescription running, in a question *inter hæredes*, upon the one title as against

the other. Where an heir has a double title in him, he may found upon either as fortified by prescription, in any question with a third party, because possession upon either has been adverse to any third party's claim. But in questions *inter hæredes* there is no length of possession which will fortify one of two titles, to the sacrifice of the other, if both be equally beneficial to the heirs possessing. Still less can prescription run against the *uberior titulus*, for no man prescribes against himself. To furnish *termini habiles* for prescription to run, there must be a party having a title to possess, which is adverse to another, in which title that other has no right or interest, and on which possession has actually followed, although such possession might have been prevented by the other party against whom prescription is pleaded. In questions *inter hæredes*, these requisites only concur in one limited class of cases, and prescription can run upon one of two titles in no other class of cases ; that is, where an heir is infeft under an unlimited title, and is also heir under a latent personal deed of entail. Prescription runs upon the former and against the latter, even in questions *inter hæredes*. But no length of possession upon one title has the effect of destroying another equally beneficial and concurrent title which continued in the person of the possessing heirs. Therefore prescription had not run against the last Lord Elibank, upon the one title against the other, and it was as competent to him in 1829 to sell the fee-simple of the *dominium utile* of Stantalane, as it would have been to Lord George to do so the day after he expedite his service in 1778. Had Lord George bought the *dominium utile* of Stantalane, and afterwards succeeded as heir of entail, his subsequently possessing for forty years would not have made him lose his fee-simple title. But though it had come to Lord George by succession, and not by purchase, if there originally was an undoubted title in fee-simple, it ought not to be lost by similar possession.

Though the late Lord Alexander (2) had never been infeft in fee-simple in the *dominium utile* of Stantalane, yet he had possessed on apparenacy for more than three years. If the pursuer took up the *dominium utile* out of the *hæreditas jacens* of Lord Patrick, he became liable by 1695, c. 24, to implement the sale by the late Lord to Purves. And as Campbell stood

LORD  
ELIBANK  
v.  
CAMPBELL.  
1833.

LORD  
ELIBANK  
v.  
CAMPBELL.  
1883.

infest in the whole barony, under a disposition from the late Lord, and the pursuer was insisting in a reduction of that infestment, he could only do so by completing his title, or at least he must be dealt with by the Court in this question, as if he had completed his title. He could not be permitted to pursue, on the footing that he was lying out unentered ; and, if entered, he could have no title to reduce a sale and infestment, which he was bound, on the contrary, by the Statute, to implement.

The property of Stantalane not having been effectually included in the procuratory of entail, and that being the only deed recorded in the Register of Entails, it could not be held that the property had subsequently passed under the entail, as that would be sanctioning an entail of property which was never recorded.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—It was clearly the intention of the entailer to include the property of Stantalane in the entail, and, being vested in a personal right to it, he had full power to entail it, if he duly exercised the power. The conveyance to Mitchelson had been apparently for political purposes, and certainly was nothing more than a colourable and temporary alienation, savouring of a mere gratuitous trust. Mitchelson reconveyed within two months ; no price was specified ; and no rents of the property had been drawn by him. The reconveyance was to Lord Patrick, and his heirs succeeding to him in the barony of Ballencrieff. When his Lordship afterwards entailed “all and whole the lands and barony of Ballencrieff,” including expressly the lands of Stantalane, it seems certain that it was his intention to include both property and superiority of these lands. His procuratory contained words sufficiently broad to embrace both, and titles were made up under the procuratory. If possession followed for forty years, the necessary effect was to render this a good prescriptive title to both property and superiority, the consolidation of which would then be presumed ; and this right, if challenged by a third party, would be a good title to exclude.

The personal right under Mitchelson’s reconveyance was never taken out of the *hereditas jacens* of Lord Patrick, the entailer. The service of each heir was as heir of tailzie and pro-

vision under the procuratory of 1776. It could take up nothing which was not included in that deed. It could not infer an intention to take up the character of heir under another deed, and especially a different and more general character of heir. Even if it appeared with certainty, on comparing the service under the deed of 1776 with the terms of any other deed, that the heir served was the party entitled to take up a provision contained in such other deed, still it was fixed by repeated decisions that the service did not and could not take up that provision. The heirs took up no right but one, the right under the entail. To this, the feudalized title, their possession must therefore be exclusively ascribed.

Even if the heirs had had a proper double title, they were bound to possess on the entail alone. This was expressed in the deed of entail, and the entailer had made it competent for any heir-substitute to declare an irritancy if they possessed any part of the estate specified in the procuratory by any other title. It was for their interest, therefore, to possess on the entail. Besides, the creditors of Mitchelson might have adjudged, or his heirs might have served to him, and sold to a third party; which hazards would be avoided so soon as prescription had run on the entail title, but would always remain so long as the heir's right was one of mere apparency. Accordingly the possession had actually been under the entail title only. The heirs had exercised generally all acts competent to proprietors infeft. The creditors of Lord Alexander (1) had adjudged the liferent interest of his estates, including the *dominium utile* of Stantallane; the land-tax had been redeemed for the same property as if entailed; the late Lord Alexander (2) had repeatedly granted private trust-conveyances of his liferent interest; and in the minute of sale to Purves, which proceeded on the assumption that the irritant clause of the entail was defective, he had expressly set forth that the whole lands contained in it were held by him and his predecessors, from Lord George downwards, as heirs of entail.

In a proper case of double title, prescriptive possession upon the one title would not have the effect of losing the other. But the very basis of such cases was, that the heir was entitled to possess at pleasure upon either of the titles in him, and that his

LORD  
ELIBANK  
v.  
CAMPBELL.  
1838.

LORD  
ELIHAM  
v.  
CAMIBELL.  
1883.

possession upon the one title did not imply the abandonment of the other. Had Lord George purchased the *dominium utile* of Stantalane, there would have been no obligation on him to bring it under the entail, and it would have been against his interest to do so. But, as the case stood, there was an express obligation on the heirs to possess on the entail title, and not to possess on the other; and it was expressly for their interest to do so. The possession, *de facto*, was in conformity to their interest and their obligation; and the entail title, being thus fortified by prescription, of necessity cut down the fee-simple title, just because the effectual imposition of fetters upon the right of an heir was necessarily incompatible with his being at the same time an unfettered proprietor. Indeed it was admitted, that if any third party attacked the estate after the forty years had run, it could be defended by the heirs pleading that it was within the entail. This demonstrated that the heirs could no longer recur to the fee-simple title; otherwise they would be in the anomalous predicament of being entitled to make it pendent on their mere pleasure, whether their estate should be accessible to their creditors, in consequence of their choosing to ascribe the past possession to the fee-simple title, or should be withdrawn from their creditors, in consequence of their ascribing it to the entail title.

The deed of entail, as originally recorded, was broad enough to embrace the lands in question, and as the *dominium utile* of these lands formed part of the entailed estate, the late Lord could neither sell it nor affect it with debt. The pursuer represented him merely as heir of entail, and was not liable to fulfil the same.

LORD MONCREIFF, Ordinary, Ordered Cases, and reported the cause to the Court.

In a Note his Lordship observed,—“The other point, namely, Whether the *dominium utile* of the lands of Stantalane is effectually entailed, appears to the Lord Ordinary to be much more difficult; and he would require farther hearing before he could feel himself prepared to decide it. He has no doubt that the defenders are entitled to plead it in defence both of the trust-deed and of the minute of sale, whatever difficulty the defe-



der, Purves, might be in, as to the settlement of the price, if the sale were to be reduced as to the other lands.

“ It is clear, that at the date of the entail, and at the death of the entailer, the *dominium utile* of Stantalane stood separated from the superiority by Mitchelson’s infeftment, and that the entailer had only a personal right by Mitchelson’s reconveyance. He could have conveyed that personal right ; and the Lord Ordinary sees no reason to doubt that he could so far have comprehended the base fee in the entail, as to lay a personal obligation on the heirs of entail to make up titles, and entail it in the same manner as the other subjects. The case of Carmichael goes thus far ; but this does not solve the present case. The difficulty here is, that the entailer simply disposes the lands of Stantalane, descriptive, as part of the estate of Ballencrieff, as they stood in his own person, with a procuratory of resignation for completing the new title by entail as a *unum quid*. There can be no doubt that this procuratory of resignation was inept and nugatory, if it were held to apply to the base fee of Stantalane ; but both the disposition and the procuratory had a clear legal meaning and effect in the mention of the lands of Stantalane, independent of that base fee altogether. The great difficulty, therefore, in this part of the case is, that if there had been no question of entail, and no room for any plea of prescription, it could not have been a matter of doubt in point of law, that the base fee standing upon personal right would have remained untouched by the disposition in the deed of tailzie, and certainly unaffected by the procuratory of resignation, and the titles which followed on it. If the destination had been different, the tailzie could never have been held to have altered the destination of the base fee ; and the superiority and property would have been taken up by different heirs.

“ There is a separate difficulty. Supposing that the personal right were held to have been conveyed by the entail, and assuming that the heirs, by taking the whole estates, were bound to make the entail effectual to protect the property as well as the superiority of Stantalane, this was only a personal obligation ; and if those heirs had a separate title in their persons, the Lord Ordinary must hold that third parties contract-

LORD  
ELIABANK  
C.  
CAMPBELL  
1888.

LORD  
ELIHANK  
v.  
CAMPBELL.  
1838.

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In a Note his Lordship observed,—“ The other point, namely, Whether the *dominium utile* of the lands of Stantalane is effectually entailed, appears to the Lord Ordinary to be much more difficult; and he would require farther hearing before he could feel himself prepared to decide it. He has no doubt that the defenders are entitled to plead it in defence both of the trust-deed and of the minute of sale, whatever difficulty the defen-

der, Purves, might be in, as to the settlement of the price, if the sale were to be reduced as to the other lands.

“ It is clear, that at the date of the entail, and at the death of the entailer, the *dominium utile* of Stantalane stood separated from the superiority by Mitchelson’s infeftment, and that the entailer had only a personal right by Mitchelson’s reconveyance. He could have conveyed that personal right ; and the Lord Ordinary sees no reason to doubt that he could so far have comprehended the base fee in the entail, as to lay a personal obligation on the heirs of entail to make up titles, and entail it in the same manner as the other subjects. The case of Carmichael goes thus far ; but this does not solve the present case. The difficulty here is, that the entailer simply disposes the lands of Stantalane, descriptive, as part of the estate of Ballencrieff, as they stood in his own person, with a procuratory of resignation for completing the new title by entail as a *unum quid*. There can be no doubt that this procuratory of resignation was inept and nugatory, if it were held to apply to the base fee of Stantalane ; but both the disposition and the procuratory had a clear legal meaning and effect in the mention of the lands of Stantalane, independent of that base fee altogether. The great difficulty, therefore, in this part of the case is, that if there had been no question of entail, and no room for any plea of prescription, it could not have been a matter of doubt in point of law, that the base fee standing upon personal right would have remained untouched by the disposition in the deed of tailzie, and certainly unaffected by the procuratory of resignation, and the titles which followed on it. If the destination had been different, the tailzie could never have been held to have altered the destination of the base fee ; and the superiority and property would have been taken up by different heirs.

“ There is a separate difficulty. Supposing that the personal right were held to have been conveyed by the entail, and assuming that the heirs, by taking the whole estates, were bound to make the entail effectual to protect the property as well as the superiority of Stantalane, this was only a personal obligation ; and if those heirs had a separate title in their persons, the Lord Ordinary must hold that third parties contract-

LORD  
ELIHANK  
v.  
CAMPBELL  
1833.

LORD  
ELIHANK  
v.  
CAMPBELL.  
1833.

admitted upon all hands, that that title has been fortified by forty years' possession. It is in vain to contend that such title was imperfect, and that, however good it might have been, or may be, as to the *dominium directum*, yet that it could not extend to the *dominium utile*. The answer to this is plain and satisfactory. Perhaps it may be an anomaly in the law and practice of Scotland, that the dispositive clause of a conveyance of the superiority is precisely the same with that of the conveyance to the *dominium utile*. It is a conveyance of the lands themselves out and out ; and the legal effect, either of the one or of the other, is to be ascertained by the corporeal possession ; and by resorting to that ostensible test, there is neither doubt nor practical difficulty. The title here produced by the pursuer is a direct and specific conveyance to the lands themselves, and the pursuer is specially infeft in these lands. From this it obviously follows, that, as the pursuer and his authors have possessed for forty years, in virtue of an infeftment flowing from the title alluded to, the pursuer is entitled now to maintain his right of property against all mortals, whether it be third parties or heirs.

" It is quite unnecessary to say more upon the subject of title, because I consider that point to be completely set at rest by the decision of the Court in the case of Middleton v. the Earl of Dunmore, 22d December 1774, and the case of Aytoun v. Magistrates of Kirkaldy, 4th June 1833 ; also the case of Grieve v. Walker, mentioned in the Cases, and that of Waddel, 19th June 1828. These afford such a series of adjudged cases, that it is quite vain to contend that the pursuer has here produced no preferable title.

" The Statute 1617, c. 12, one of the most valuable in the law of Scotland for the protection of land rights, requires two things : *First*, That there shall be a title ; *Second*, That there shall be real, actual, and ostensible possession, exclusively in virtue of that title. When these concur, the law has broadly and well said, that the possessor shall be protected against all mortals. But the defender in this case contends, that the pursuer is not entitled to the benefit of the possession he has enjoyed, and so is not entitled to plead prescription ; because—

“ *First*, That there were two titles in the persons of the heirs of entail, the one limited and the other unlimited, and that the possession must be ascribed to both titles.

LORD  
ELIBANK  
v.  
CAMPBELL.  
1833.

“ *Second*, Because this, it is alleged by him, is a question *inter hæredes* ; and that, where such questions occur, prescription is not pleadable.

“ These propositions may be very much doubted ; and it is apprehended that the defender is here under a mistake, and that these pleas, were they better founded than they really are, are not applicable to the circumstances of this case.

“ Here it may be observed, that it is necessary to attend to the situation of matters as they stood in 1776, when Patrick Lord Elibank executed his procuratory of resignation, containing the entail of Ballencrieff.

“ Patrick was absolute proprietor, in fee-simple, of all the lands in question. In 1760 he created, for what special purpose is not explained, a feu-right in favour of Mr. Samuel Mitchelson, his confidential agent ; and upon this Mr. Mitchelson was infest, thus producing a proper base fee in the lands so conveyed. In a very few weeks thereafter, Mr. Mitchelson reconveyed these lands to his author, with procuratory and precept ; but upon this reconveyance Lord Patrick did not think fit to execute any procuratory of resignation, or to execute the precept of sasine, either of which he was entitled to do, in strict form. Hence, in this state of matters, when Lord Patrick executed his entail in 1776, the lands in Mr. Mitchelson’s conveyance stood in this situation : *First*, The base fee, or infestment in the lands, stood in the person of Mr. Samuel Mitchelson ; and, *second*, The personal right or title to defeat Mr. Mitchelson’s infestment, was vested in the person of Patrick Lord Elibank ; so that, at making the entail, the real right of the lands of Stantalane was vested in the person of Samuel Mitchelson, and the personal right in Patrick Lord Elibank. Now, from this it is argued, that here there were two titles vested in the heirs of entail upon which possession could be assumed ; and, in consequence of the existence of these two titles, the pursuer must be excluded from the benefit of prescription.

“ I demur as to this plea of the defender. *First*, I doubt the existence of two titles at all ; and, *second*, I doubt of the trans-

LORD  
ELIBANK  
v.  
CAMPBELL.  
1833.

mission of the personal right in the way and manner contended for by the defender.

“ *First*, I doubt the existence of two titles at all, because the title referred to in law, so as to enable a competition to take place, is not a personal right, which, no doubt, has certain effects ; but the title, in the eye of law, to enable a person to compete, and claim possession, is an infestment or sasine. The possession must ever be ascribed to the infestment ; and it is an erroneous application of the word to call a personal right a title, in questions of this nature. Now, it so happens in this case, that no infestment has, to this hour, been taken on Samuel Mitchelson’s reconveyance ; and that base fee remains in *hæreditate jacenti* of his heirs at this moment. Therefore, supposing Lord Patrick and his heirs had continued in possession for a thousand years, they never could have prescribed, under such personal title, a right to these lands. From this it necessarily follows, that two titles really do not at all exist.

“ Again, supposing that the personal right in Lord Patrick was a title, then the defender’s argument is quite erroneous, when he proceeds to maintain that that title was vested in and transmitted to the heirs of entail by the general service of George Lord Elibank in 1779, or was afterwards comprehended in the several special services mentioned in the papers. On this point the defender is totally mistaken.

“ Services are *strictissimi juris*, and justly so, because the consequences of such services are most serious to the individual. In the procedure of service, the most material and essential part of it is the claim of the party. It is this which establishes its measure and extent. If the verdict of the jury, or if the decree of the judge, exhibited by the retour, goes one iota beyond the claim, the same so far is null and void, totally inefficient, and of no avail whatever. The service is a solemn *aditio hæreditatis*. It is an *actus legitimus*, precise in its nature and in its form. When a person claims to be served as heir of provision, in virtue of a certain deed, it is very plain, that by no process of law or reasoning can it make him an heir of provision in any other deed. There may be as many heirs of provision or tailzie as there are different deeds or subjects. It is very obvious that a man may choose to be an heir of provision

in one settlement, who may not choose to become a representative of the same author in another settlement. This is so plain and obvious a principle of the law of Scotland, that it is almost unnecessary to quote authority. But it so happens that there is one so precisely in point, that it becomes proper to bring it under notice, although not adverted to by the parties. The question occurred in a noted case, relative to the estate of Bargattan, Spalding *v.* Lawrie, decided by the Court 20th February 1784. It was there found, that a service as heir of tailzie and provision would not transmit an estate regulated by simple destination. The circumstances of that case were very similar to the present ; for there the entailer, having executed an entail of the lands of Bargattan, with the usual clauses, afterwards purchased the teinds affecting the lands, which, by the law of Scotland, is a pure heritable subject ; and when he made the purchase, he took the disposition of those teinds ‘ to himself and his successors in the lands.’ No infeftment followed upon this disposition ; so, at the entailer’s death, he had nothing but a pure personal right to the teinds. The intention of the entailer to join the teinds with the lands was quite manifest. The entailer died without issue ; and his next heir, his sister, Margaret Lawrie, expedie a service as heir of tailzie and provision. Thereafter, a creditor of the entailer appeared, and claimed the teinds as the property of his debtor ; and so it came to be considered by the Court, what was the effect of the service of Margaret Lawrie, as an heir of tailzie and provision, in virtue of a certain deed. The Court found, that a special service as heir of entail would not transmit the personal right, though destined to the same series of heirs.

LORD  
ELIBANK  
*v.*  
CAMPBELL.  
1833.

“ The strict nature of services and their true effect were fully elucidated and explained in the celebrated case of the Earl of Cassillis, 24th November 1807.

“ From this it may be stated, that the defender is entirely in the wrong when he assumes that the service of George Lord Elibank carried the personal right which Lord Patrick had, under Samuel Mitchelson’s reconveyance, of the lands in question. It is not so in point of law ; and, of course, the heirs of entail never had a double title in the way and manner pleaded by the defender.

LORD  
ELIBANK  
v.  
CAMPBELL.  
1888.

“ But, when the nature of the deeds is attended to, it appears to me that the personal right has been carried to the heirs of entail in a different way, and which has not been adverted to by either of the parties, and has been entirely overlooked.

“ I lay it down as a general proposition of the law of Scotland, that all procuratories of resignation, or *in favorem*, and all precepts of sasine, go to assignees, unless assignees are specially excluded. This is evident from the Statute 1693, c. 35, where it is declared, that all such deeds, ‘ either already granted or to be granted, shall, in all time coming, continue in full force, and shall be sufficient warrands, not only for making of resignations and taking sasines in favours of the parties to whom they are or shall be granted, but likewise in favours of their heirs, assignees, and successors, having right to the said procuratories and precepts, either by a general service, or by disposition and assignation, or by adjudication, as well after as before the death of the granters, or parties to whom they are granted, or both ; providing always, that the instruments of resignation and sasines taken after the death of either party express the titles of those in whose favours the resignation is made, and to whom the sasine is granted, and that the same be deduced therein, otherwise to be void and null.’

“ Now, under this Act, the question may occur, whether such personal rights are transferred by disposition or assignation ? This will depend upon the deed executed. This leads me, therefore, to call the attention of the Court to the terms of the procuratory of resignation executed by Patrick Lord Elibank.

“ A procuratory of resignation is a deed of a peculiar nature. It is a sort of disposition, and it is very ordinarily resorted to, particularly in making entails and in creating destinations, following upon contracts of marriage. There is hardly an estate in Scotland, of any consequence, that does not stand upon a deed of that kind. The deed is peculiar in this way, that the granter creates direct and legal obligations against himself, and also against all those who are pointed out by him to take in virtue of that deed. No doubt, every disposition may create obligations ; but in the case of a procuratory of resignation, these obligations are direct, immediate, and personal, and, of course, lie *in gremio* of the right. Now, it is



LORD  
ELIBANK  
v.  
CAMPBELL.  
1883.

proper that the Court should have in view the special terms of the procuratory in this case, and the deed of entail ; for Lord Patrick binds himself, his heirs and successors, to resign certain lands specified in the deed, but with this further obligation, that he shall resign them, ‘ together with all right, title, and interest which we have, or can pretend, to the lands, barony, milns, teinds, and others before specified, or to any part or portion thereof.’

“ Now this clause is intended for the very purpose of transmitting to the heirs in the deed, all personal, all subordinate, all collateral, and all imperfect feudal rights, which may be vested in the person of the granter. He thereby obliges himself to assign and convey all such rights. But the granter here has not been satisfied with that obligation against himself ; but Patrick Lord Elibank in this deed has further provided and declared, ‘ that our said heirs-male shall use any other rights which they may happen to have or acquire thereto, as additional or collateral securities and titles for strengthening and supporting this deed of tailzie only, and for no other purpose whatsoever.’

“ It is apprehended from this, that the personal right, vested in Lord Patrick, was truly and legally conveyed by him to his heirs of entail ; and, of course, when they took up the entailed lands, they necessarily became bound to make up legal and valid titles to all other rights in their persons, or in that of the granter, and that under all the provisions, conditions, and obligations which he thought fit to impose upon them.

“ This is a case which is not without precedent, and has been already solemnly decided by the Court ; and, in fact, it appears to me to put an end to this cause. The case to which I allude is that of Robert Smith against Alexander Oliphant Murray, decided 9th December 1814, where it was solemnly found, ‘ that where an entail conditions that the heirs of entail shall not possess the lands contained in it under any other title than the entail, an heir, served heir of provision and of entail, and making up titles to part of the lands contained in the entail, becomes bound to possess, by the same title, any other lands contained in the entail, to which he acquires a personal right by a general service.’

LORD  
ELIABANK  
v.  
CAMPBELL.  
1833.

" From all this, then, it is quite plain, either that there was no second title in the person of the heirs, as alleged by the defender, or that the personal right, or the second title, must be held as conveyed under all the obligations of the entail ; and, of course, the entail must be effectual against the defender, even upon that ground.

" In the second place, it has been maintained by the defender, that prescription is not pleadable where the question is *inter hæredes*. But to this proposition, in this case, several objections occur.

" *First*, There does not appear to be any authority for any such distinction. The Act 1617, c. 12, the great protector of our land rights, points out no such distinction. It makes no reference to titles being limited or unlimited, neither does it say that there is to be a distinction in questions between third parties, and those where it occurs between heirs. It simply and broadly declares, ' that whosoever have bruicked, by themselves, their tenants, and others having their rights, their lands, baronies, annualrents, and other heritages, by virtue of their heritable infeftments, for the space of forty years continually and together, following and ensuing the date of their said infeftments, and that peaceably, without any lawful interruption made to them therein, during the said space of forty years, that such persons, their heirs and successors, shall never be troubled, pursued, nor inquieted in the heritable right and property of their said lands and heritages foresaids, by his Majesty, or others, their superiors and authors, their heirs and successors, nor by any other person pretending right to the same.'

" *Secondly*, It is doubted how far the allegation of the defender is consistent with the truth ; for, upon examining the cases referred to, some of them do appear to have been questions *inter hæredes*. In particular, the case of *Bruce v. Bruce*, in 1770, and affirmed in the House of Lords, was a question betwixt the heir-of-line and the heir of entail ; and others appear to be in the same situation.

" *Thirdly*, I cannot discover any question here between heirs ; the only question is one betwixt a creditor of Alexander the second and the heir of entail. And, moreover, that creditor

LORD  
ELIBANK  
v.  
CAMPBELL  
1838.

has not attached the subject in any way or manner known by the law of Scotland ; and it is that creditor, having no feudal title, who is insisting to turn the heir of entail out of possession, who has enjoyed the lands for more than forty years, in virtue of a legal infeftment. This appears to be contrary to all our principles of law regarding heritage.

“ Before concluding, it may be proper to notice a peculiarity which certainly distinguishes this from ordinary cases. It is evident that the conveyance by Patrick Lord Elibank to Mr. Samuel Mitchelson, in 1760, was a trust and confidential conveyance. It is likely that it was intended for the purpose of creating freehold qualifications. At the same time, this is by no means explained by the parties ; but that it was a trust-conveyance is perfectly evident from the terms of the reconveyance. The conveyance to Mr. Mitchelson is executed in April 1760. Infeftment is immediately taken. In a few weeks thereafter, the very same subjects are reconveyed to Patrick Lord Elibank. In that reconveyance, no price is specified ; no term of entry is mentioned. Particular pains are taken to exclude Mr. Mitchelson from drawing one farthing of rent, and, of course, he never was in possession for one hour. Again, there is no absolute warrandice ; on the contrary, there is a special clause of warrandice from fact and deed allenarly. These afford indubitable evidence that there was no onerous transaction between the parties, but a mere fictitious conveyance and reconveyance between Patrick Lord Elibank and his confidential agent. Under these circumstances, it is not surprising that when Patrick Lord Elibank executed his entail in 1776, he should have thought that he had full and complete power to dispose of the lands of Stantalane in question, just as completely as he had of other lands, of which he was then in the actual possession.

“ In cases of this kind, the Court have been accustomed to view the right of the truster in the most favourable way. The question cannot be better illustrated than by the case of *Rose v. Fraser*, 26th January 1790. There the proprietor of an estate had conveyed property to hold base, so as to create freehold qualifications, and, as in this case, a reconveyance was executed, but not followed by sasine. In these circumstances,

LORD  
ELIBANK  
v.  
CAMPBELL.  
1888.

the widow of the grantor claimed a *terce*, and, of course, the question came to be, what was the nature of the right which was held by Mr. Rose, the husband of the claimant. Now the Court held, particularly the Lord President Campbell, 'that the reconveyance, though not completed by *sasine*, was sufficient to transfer the substantial right in contradistinction to the nominal title of his trustee.' If such be the law, then Patrick Lord Elibank, having unquestionably the substantial right, was entitled to make the entail 1776 of the lands in question.

"It is likely that Mr. Samuel Mitchelson viewed it in this light, because he was one of the most esteemed feudal conveyancers of his time; and it is not likely he would have allowed his constituents to make an entail upon an imperfect right. It is very possible also that he might have been misled by the opinion of the Court, in a case decided not long before the transaction in question, 11th March 1756, *Dalzell v. Dalzell*, and George Henderson, wherein they found that a trust could be declared after the death of the truster, and that, without the form of a service, proper titles could be made up by the authority of the Court, and so the right of the truster completely supported. It is very likely that such a judgment might have led Mr. Mitchelson to suppose that everything was done by him to reinstate Patrick Lord Elibank in his property, when he granted to him his reconveyance.

"I have only further to observe, that the defender has, with great talent and ability, brought forward a great number of cases as favourable to his pleas. From the way and manner in which these are brought forward and treated, the argument deduced from them is extremely imposing: but upon due consideration, it is apprehended that the view taken of those cases is somewhat erroneous. They are brought to bear upon the point of prescription. Now, upon some of them, it is perfectly evident that the matter of prescription, however argued by counsel, in their anxiety for their clients, was plainly not applicable at all, or the fact was, that in place of questions of prescription, the decision turned upon pure questions of succession. In the case of the *Marquis of Tweeddale v. the Earl of Dundonald*, in 1726, so much founded upon, and so fully illustrated, it is humbly thought that the Court most properly

‘repelled the allegiance of prescription pled for the Marquis of Tweeddale,’ because in that case both titles were equally good titles of possession, as well that against which the prescription was pleaded, viz., the base infeftment of 1753 and 1756, in favour of William Lord Cochrane, as the Crown charter and infeftment of 1680, in favour of John Earl of Dundonald, upon which the Marquis of Tweeddale founded his title ; and so the actual and corporeal possession afforded an equal support to both rights, and could not be founded on by either party to the prejudice of the others. Besides, William Earl of Dundonald, the common ancestor, had a reserved liferent, under which he, as proprietor, continued in possession down to his death, in 1685, and in consequence of deducting his liferent, the forty years had not run on the investiture of 1680, when the rights of the parties came under discussion. That circumstance alone affords a complete answer to the argument so fully enforced upon the part of the defender in this case.

LORD  
ELIBANK  
v.  
CAMPBELL  
1888.

“ Whatever difference of opinion may be formed upon the collateral views of this case, there still remains one, in which all must concur, and which is perfectly conclusive in this case, although it has not been adverted to by either of the parties.

“ Samuel Mitchelson, out of whose person or his heirs the base fee of the lands of Stantalane and others has never yet been taken, died upon 14th June 1788. The sale of these lands by Alexander (2) Lord Elibank to the defender was not made till 1829, and the action of reduction was not brought till 1830. Of course, more than forty years have elapsed since Mr. Samuel Mitchelson’s death, and during all that period, these lands have been openly, publicly, and exclusively possessed by the proper superior, upon a title flowing from the Crown, the proper authority. Under these circumstances, I humbly maintain that the base feudal right, formerly in the person of Mr. Samuel Mitchelson, is now sopite, extinguished, and annihilated, and can be revived by no human being. It no longer exists *in rerum natura*. I am therefore of opinion that the action of reduction is well founded.”

LORD GILLIES.—“ I agree very much in the views which have been expressed, and I do not consider this a case to be attended with serious difficulty. The only puzzle arises from

LORD  
ELIHANK  
v.  
CAMPBELL.  
1888.

the ingenuity and learning with which the defence has been pleaded, and attempted to be supported by some doctrines in the law of prescription of a very extraordinary nature ; doctrines which are not merely new, but startling and inconsistent with the known operation of the Statute 1617, c. 12. Such, for example, is the plea that prescription has no place in questions *inter hæredes*, except in the solitary and limited instance stated by the defenders. In order to test this principle, look to some of its consequences. The defenders admit that prescription had run upon the entail, in any question with a third party, and that a creditor, attempting to adjudge the *dominium utile* of Stantalane, would be effectually barred by the entail. Upon what ground could the creditor be so barred ? Upon no other ground than this, that consolidation of the property and superiority had taken place, and that thus the *dominium utile* was effectually covered by the entail. There is no other ground on which the creditor could be defeated. Is it possible, then, to maintain, that, at the same moment, the same estates can be consolidated and non-consolidated ? They must be consolidated, or the creditor is not barred from attaching the *dominium utile* ; and if they be consolidated, the heir of entail is as effectually fettered *quoad* the whole, as if consolidation had taken place in the person of the entailer, before executing the entail. But if he be effectually fettered as to the whole, how can he recur to any fee-simple right of a part ? Or suppose that there had been no entail in the present case, and that, as soon as forty years had run on the charter and sasine, the heir in possession had sold the barony, and granted a procuratory of resignation, under which the purchaser expedite a charter, and was infeft. If the purchaser's right to the *dominium utile* of Stantalane were instantly thereafter challenged by any third party, it is not disputed that he might defend on his charter, and that of his author, as containing both the property and superiority of Stantalane. But on what principle is it that he could do so, except that consolidation of the *dominium utile* with the *dominium directum* had taken place in the person of the heir, his author ? It must be admitted, if the purchaser's title be good, that consolidation had taken place, although there was no resignation *ad remanentiam*, for otherwise the purchaser's title

would be defective. But if it has taken place, in virtue of the heir's possession, so that a purchaser from the heir can found upon it, how can it be denied that it had taken place, supposing the heir's possession to have continued, without any sale? If the heir's possession operated consolidation at all, it could not do so the less because the heir himself (and not any disponent) was to found upon it. Yet the doctrine of prescription having no place *inter hæredes*, would lead to this inconsistency, that the very same possession which would be effectual in favour of an heir's disponent, would not be effectual in favour of the heir himself.

LORD  
ELIHANK  
v.  
CAMPBELL.  
1833.

“The incongruous and dangerous consequences which would result from this doctrine are apparent, and the defender's reasoning is founded on an erroneous apprehension of some of the leading cases in which questions have arisen as to the effect of possession by a series of heirs having a double set of titles in them, in which case the defenders maintain, that, with one very limited exception, the heirs cannot plead prescription on either title, or, as it is said, on the one title against the other. I have repeatedly had occasion to express regret at the tenor of some of these decisions, in pronouncing which, it humbly appears to me that the Judges, however distinguished, would have acted more safely had they followed the doctrine of such lawyers as Stair, or Craig, in place of adopting new views of their own. But the doctrine of these cases should not be extended; and, although they seem to lend some countenance to the pleas of the defenders, as well as to part of the views expressed in the Lord Ordinary's note, I think they only do so in appearance, and not in reality. For the doctrine does not truly go farther than this, that where a party, having full power over his estate, disposes it, or binds himself in a marriage-contract to provide it, in favour of a certain series of heirs, leaving each heir full power to alter at pleasure, and where these heirs, being also heirs under the old investiture, make up titles, under the old investiture, for forty years together, they are still held not to have effectually repudiated and extinguished the express destination. Their power to alter was unquestioned; but the Court held that the steps which they took did not prove their intention to alter, and were not an effectual exercise of their power to alter.

LORD  
ELIHANK  
v.  
CAMPBELL.  
1883.

“ Thus, for example, from the case of Smith and Bogle no farther doctrine is deducible than this, that where a disposition of an estate is executed, by a party having full power, destining it in full property to a certain series of heirs ; and where the heirs under this destination are also heirs-of-line, and serve in that character, they do not thereby alter the destination under the deed. Each service placed the heir in the room of his predecessor, and thus in the room of the party who granted the deed of destination ; and if the heirs die without taking any step for altering that destination, the deed will regulate their succession, so soon as the heir-of-line comes to be not also the heir of destination, precisely as it would have regulated the succession of the granter, in case his heir-of-line had not also been his heir of destination. The case of Durham is of a similar nature, and the argument which was successful in that case was, in so many words, that ‘ a service as heir is not a regular mode of altering the settlements of an estate.’ The case of Zuille, 4th March 1813, is of the same import. That is the whole length of these decisions ; and they are not in point to the present case, for in them there was no question as to the power of the heirs possessing, to have altered the destination, had they chosen to do so, either before or after their possession had endured for the full period of prescription. It was merely found that service as heir-of-line to the granter of a disposition, or to his heirs, is not a competent mode of altering the destination contained in that disposition. Properly speaking, it was a *quæstio voluntatis*, which arose as to the succession of the party who last held in himself the double character of heir under the destination, and heir whatsoever. And the question was, whether the power of altering the destination, which was undoubtedly possessed by the heirs, had been competently exercised by them. It was found that there had been no competent exercise of the power.

“ In these decisions no question of prescription was properly involved ; and in the case of Bald, which has been much insisted on, no course of prescription had run. I am reported to have expressed this opinion in deciding a former case some years ago. At this distance of time, I have no recollection of what then passed on the Bench, but I am satisfied that such an



opinion is well-founded. I shall now advert to the details of the case of Bald a little more minutely, in consequence of the defenders having pressed strongly on the Court, that prescription had run. Archibald Buchanan, a vassal infeft in the lands of Cameron, purchased the superiority of these lands, and took a Crown charter, conveying them to him in liferent, and to his son, William, in fee, but reserving power to himself to alter and dispoñe at pleasure. Infeftment followed in 1705. In 1730, in William's contract of marriage, his father, Archibald, dispoñed to him absolutely the *dominium utile* of the same lands, and William was infeft under this disposition, so that he possessed two rights affecting the lands. He was fiar of the superiority, or *dominium directum*, in virtue of the Crown charter under which his father was liferenter, with a power to alter at pleasure ; he was also fiar of the *dominium utile* in virtue of an absolute and onerous conveyance in the marriage-contract. He predeceased his father, and his heir made up titles to him by special service, and by infeftment on a precept from Chancery. Subsequent heirs did the same. One of these heirs executed a deed, which was challenged by the heir-at-law of William, as inept to carry the *dominium utile*, in respect that it was still in *hæreditate jacenti* of William, having never been consolidated with the superiority, and titles having been made up to the superiority alone. Thus one main question raised, and in truth it was the only one requiring to be decided, was, whether consolidation operated *ipso jure*. On this point the opinions of the Court were delivered. Prescription was also pleaded, but there was no ground for it. Archibald Buchanan, the liferenter, lived till 1760, having survived his son William. The action was raised within twenty-five years after the death of Archibald. If possession by the liferenter could be reckoned the possession of the fiar, (and I hold that it cannot in the case of a liferent by reservation,) then forty years' possession had taken place. But under what title ? Under the Crown charter, not under the marriage-contract. In order to found prescription, therefore, the possession of the son and his heirs must have been ascribed to the defeasible in place of the absolute title ; to the title which was revocable at the pleasure of Archibald Buchanan while he lived, and not to the title which

LORD  
ELIHANK  
v.  
CAMPBELL.  
1828.

LORD  
ESKDALE  
v.  
CAMPBELL.  
1833.

was absolute and irrevocable from the first. But possession on the former title must have been of necessity precarious ; and possession, obtained or held, *vi, clam, aut precario*, cannot found prescription. After deducting the period during which the possession, if ascribed to the charter, must have been precarious, there did not remain a course of possession at all approaching to the term of the long prescription.

“ I therefore consider that the case of Bald is not an authority against the doctrine that consolidation is effected, where a course of prescription has run upon titles containing the lands, out and out, *tanquam optimum maximum*, while a prior subaltern right has remained entirely neglected. And I know of no decision against that doctrine. It is true that the useful and important law of prescription has been occasionally much endangered by the ingenuity and subtlety of some comparatively modern lawyers. Among the opinions delivered at deciding the case of Bald, I have always inclined to hold that of Lord Eskgrove, who differed from Lord Braxfield and the other Judges, as containing the sound view of the law of Scotland. Lord Braxfield did not hesitate to impugn the doctrines of Stair ; but I apprehend the truth to be, that there has been a tendency among our later lawyers to too much metaphysical refinement and speculation in their views. They were too much addicted to the discovering, or the invention, of what they called the true principles of the feudal law, and, as corollaries from these principles, they deduced doctrines in practice quite at variance with Craig, and in opposition to Stair, the authors to whom Lord Eskgrove appeals, and who probably understood the principles of the feudal law fully as well as any of our more immediate predecessors.

“ I have been led into these observations by the turn which part of the defender’s pleadings took ; and now I would point out, shortly, the circumstances in the present case which appear to be decisive in favour of the pursuer.

“ Lord Patrick conveyed the *dominium utile* of Stantalane to Mr. Mitchelson, who, in one month, reconveyed it to his Lordship. Had there been no reconveyance at all, it is indisputable that prescription must have run upon the entail title. This is clear, and it is undisputed, because then the possession of the

heirs of entail could be ascribed to no other title. It would be strange if the mere existence of that reconveyance should have the effect of destroying the basis of any prescription, and thereby defeating the intention of the party in whose favour it was granted ; and it seems altogether impossible to allow this effect to it, if the Court are satisfied that it was the intention of the entailer, and of every heir of entail for forty years after the infestment of Lord George, that possession should be upon the entail only, and if, *de facto*, their possession is imputable to that title exclusively. The intention of the entailer appears to be clear ; his procuratory is free from all ambiguity, and conveys the lands out and out ; he binds his heirs to resign the whole lands, and every right or title to them, and to possess under the entail alone, and to use every other title they have, or may acquire, as mere collateral rights to strengthen their possession under the entail. In precise conformity with these injunctions, Lord George, and the other heirs of entail, make up titles, and enter into possession. It has been said, that each service took up the personal right under Mitchelson's reconveyance : even if it did, it does not follow that the possession of the heirs of entail is thereby thrown loose, and rendered applicable to either the feudal or the personal title, according to the pleasure of each, though undeclared till after prescription had run. For, even if the heirs took up the title, the very service under the deed 1776 (which is said to have carried it to them) laid them under an express obligation to use it, not as an independent title of possession, but solely and exclusively as a means of fortifying their possession under the entail. The intention of the entailer being clear that the property and superiority of the whole lands should be so possessed, and the procuratory of entail being conceived in terms sufficiently ample to express his *enixa voluntas*, the heirs who took the rest of the estate were bound to give effect to that intention, and to comply with that express injunction. This is clear, and it is not a question of feudal law at all, but merely an application of the familiar doctrine of approbate and reprobate. Had the heirs not possessed exclusively upon the entail—had Lord George, for example, indicated an intention to avail himself of his right to the *dominium utile* in fee-simple, he might have been com-

LORD  
ELIHANK  
v.  
CAMPBELL.  
1888.

LORD  
ELIABANK  
v.  
CAMPBELL.  
1883.

pelled, by an action at the instance of the next heir, to fulfil the obligation, which was clearly incumbent on him, and to bring it under the fetters of the entail. This I conceive to be decisive of the present question; and this view has always appeared to me to be the shortest, and, at the same time, the strongest which can be taken of the case.

“ But to proceed to another point, I think that in consequence of the service of Lord George, as heir of entail under the deed 1776, and of the services of succeeding heirs under the same deed, coupled with their possession for forty years, the lands of Stantalane, both property and superiority, are now within the entail. Against this view it is pleaded, that there are no *termini habiles* for prescription, in questions *inter hæredes*, except in the special case where it runs on an unlimited and feudalized title against a latent and limited personal title. I demur to the doctrine in itself, and have already in part disposed of this branch of the defender’s argument. I also doubt its application to the present case, when the two titles are contrasted, on the one of which, it is said, no prescription could run against the other. The one title gave a right to the whole lands, property and superiority, *tanquam optimum maximum*; the other was a subaltern right to a part, a mere burden upon the whole. But this is not all; the first title, being duly feudalized by charter and sasine, was a title on which prescription could run, and which would, by prescription, be rendered unchallengeable. The other title could never found prescription, for no party was ever infeft under the reconveyance of Mitchelson. It seems to me, therefore, to be impossible for the Court to ascribe the possession which has taken place to this last title, which never could be fortified by prescription, in place of ascribing it to the former, which would thereby be rendered valid and unimpeachable.

“ There is just one other point to which I shall advert. The argument that the possession of the heirs should be ascribed to their right under the reconveyance by Mitchelson, rests mainly upon the assumption that the service of each successive heir of entail, as heir of tailzie and provision under the procuratory 1776, carried the personal right under another deed, the reconveyance of Mitchelson. I do not hold that the service could

have such effect. The service under the procuratory 1776 would carry what was contained in that deed, but it would carry nothing else ; and this precise point was decided in the case of Spalding. On this subject I concur with Lord Balgray, as I do generally in what fell from his Lordship.

LORD  
ELIHANK  
v.  
CAMPBELL.  
1838.

“ The heirs of Lord Patrick were bound to make up titles under the entail to the whole lands out and out, and having done so, they were bound to possess on the entail. They did make up a feudal title, in terms of their obligation ; and it would now be equally contrary to law and justice to hold that their consequent possession can be ascribed to any other title than their charter and sasine, the only one upon which prescription could run.”

LORD PRESIDENT HOPE.—“ I concur generally in the views which have been expressed, and in the conclusions at which your Lordships have arrived. But there is a separate ground, which has not yet been noticed at the bar or on the bench, which would appear to me to be sufficient of itself to support the reduction, even if the long prescription, after deducting minorities as required by 1617, c. 12, had not been applicable to this case. I allude to the effect of the previous Statute 1594, c. 218, upon which it is often useful to found, when the interruption of minority would prevent the other Statute from applying. The preamble of the Statute 1594 sets forth that sundry of the lieges have bruicked their lands by virtue of the infeftments of themselves and their predecessors for forty years together, ‘ notwithstanding whereof, the said infeftments are sundry times drawn in question for want of procuratories of resignation, instruments of resignation, precepts of *clare constat*, or other precepts of sasine which are not extant.’ The Statute declares, ‘ That nane of his Hieness’ lieges may be compelled, after the space of forty years, to produce procuratories or instruments of resignation, precepts of *clare constat*, or other precepts of sasine of lands, &c., whereof the present heritable possessors and their predecessors, &c., are and were in possession by the space of forty years together, and that the wanting, and in-laik thereof, nor nane of them, sall be na cause of reduction of the infeftments granted to the proprietors or their predecessors, &c., of the lands whereof the charter (making

LORD  
ELIBANK  
v.  
CAMPBELL.  
1838.

mention of the resignation) and the instrument of sasine (making mention of the precept of sasine, by virtue whereof the sasine was given) are extant.' The Act is expressly extended 'to all procuratories and instruments of resignation, &c., the wanting whereof, nor nane of them, sall be na cause of reduction or quarrel whatsoever after the space of forty years; where infetment has taken effect by possession, by the said space of forty years, in manner above rehearsed, and where the charters and instruments of sasine are extant as said is.'

"Both Erskine and Stair treat of this Act as remaining in force, and available to the lieges. There was occasion to consider this very maturely in disposing of the great Annandale cause in 1739, between the Marquis of Annandale and John Lord Hope. The first counsel of their time, Mr. Charles Erskine of Tinwald, and Mr. Robert Dundas of Arniston, pleaded the cause, and the Statute was then founded on without any objection to its validity. It was indeed held not to be applicable to that case, as the full term of forty years had not run, and also, as the deed awanting was a disposition, and that is not one of the deeds specified in the Statute; but the validity of the Statute was never impeached.

"Assuming, therefore, that the Statute remains in full force, I think it is available to the pursuer, Lord Elibank, in obviating the defender's plea, that the *dominium utile* of Stantalane was never resigned after Mitchelson's reconveyance, and, therefore, was never consolidated with the *dominium directum*. For the full term of forty years had run before the accession of the last Lord Elibank, whether it be computed from the time when the reconveyance was executed, or from the time when George Lord Elibank, as heir of entail, expedite a charter of resignation, containing *ex facie* the lands of Stantalane, out and out, *tantum optimum maximum*. When, therefore, it is objected that no resignation was ever made under the procuratory in Mitchelson's reconveyance, the pursuer may plead the Statute, and maintain that the want of the instrument of resignation is not to be made a ground of reduction or quarrel against him. The charters and infetments produced by the Lords Elibank, contain the actual lands of Stantalane; for there is no such thing in feudal law as infetment in the superiority without the lands,

the superiority being in law the *dominium directum et eminens* of the lands themselves. Standing on their charters and infeftments, therefore, the Lords Elibank are not liable to challenge, although they fail to produce any instrument of resignation under Mitchelson's procuratory. One cause assigned in the preamble of the Statute for the disappearance of such a writ is the lapse of time ; another is, that the writ may have been lost or destroyed as being no longer of any use. Considering the words of the Statute, therefore, the Court cannot now presume, at this distance of time from the non-appearance of an instrument of resignation, that there never was resignation made ; they can only hold that though made, the writ has disappeared, but that the pursuer is no longer open to challenge from its non-appearance. For, supposing resignation to have been made, Lord Elibank was under no obligation to record it. If he chose to run the risk of Mitchelson's good faith and responsibility, as guaranteeing him against creditors or purchasers, his Lordship might have burnt the instrument of resignation the day after it was executed, and taken his stand exclusively upon his infeftment in the lands. And, indeed, that very infeftment is precisely the thing on which he must still have taken his stand, even if a resignation *ad remanentiam* had been executed. For no new infeftment could have followed on the resignation ; his Lordship as superior, and, in feudal law, true proprietor, was already invested in the lands by infeftment under the Crown charter ; and the resignation of the feu-right could have operated no new infeftment in his favour, but would merely have discharged a burden previously existing on his infeftment.

“ Upon this separate ground, therefore, I am of opinion that the defenders cannot effectually plead that there was no resignation executed under Mitchelson's procuratory. And as such resignation would at once have destroyed the groundwork of the defenders' argument as to Stantalane, I think the pursuer entitled to prevail, by aid of the Statute 1594, c. 218. But there are other grounds for supporting this conclusion, and I shall shortly notice them, though I have been in some degree anticipated by the opinions already delivered.

“ And, first, I consider that the defenders' own title rests on the infeftment of their author, the late Lord Elibank. In so far,

LORD  
ELIBANK  
v.  
CAMPBELL.  
1838.

LORD  
ELIBANK  
v.  
CAMPBELL.  
1838.

therefore, as the defenders could succeed in proving that a subject was not covered by that infeftment, they would just be demonstrating that they themselves were without a title to it. This seems clearly to arise from the fact, that the late Lord executed the trust-disposition and minute of sale to the defenders, expressly in his character of feudal proprietor, infeft in the barony of Ballencrieff, which contained, *inter alia*, Stantalane. But his Lordship had no infeftment except as heir of entail. If, therefore, the defenders could shew that Stantalane was not within the entail, they would at the same time prove that their own conveyance to it was inept, as flowing *a non habente*. If the *dominium utile* of the lands of Stantalane be not within the entail, it never was taken up by the late Lord Elibank, and he never was in condition to dispoise it. It must now be lying in *hæreditate jacente* of the entailer, Lord Patrick. However good the plea of the defenders might be, if stated by the heir-of-line of Lord Patrick, it cannot be urged by the defenders without destroying their own title.

“ But, second, though neither Mitchelson nor his heirs had ever executed a reconveyance of the *dominium utile* to Lord Patrick, but had allowed the Lords Elibank to continue in possession for forty years, as they undoubtedly did, that would have fully vested the *dominium utile* in them by the positive prescription, while Mitchelson and his heirs would have lost all right by the negative prescription. This is a clear proposition in law, and it is sanctioned by several decisions. Thus, in the recent case of Ayton, it was found that a superior may, by exclusive possession, prescribe a right to the property of lands, notwithstanding a grant of them to a vassal. That doctrine is expressly laid down by Lord Cringletie, with the assent of the other Judges. But that comes to be the very case in which the Lords Elibank would have stood had there been no reconveyance by Mitchelson.

“ Again, in the case of Grieve, the Court found that a superior’s infeftment in the lands, followed by forty years’ possession, was sufficient (although there had previously been a subaltern infeftment) to entitle the superior to grant to a purchaser a good title to both property and superiority. There is another case of Waddell, involving doctrine of a similar import.



“ There are two other cases which deserve attention in reference to this branch of the discussion ; I mean those of Bruce, Dec. 6, 1770, and Middleton, Dec. 22, 1774. In the first of these, which was affirmed on appeal, the Court found that Sir Thomas Bruce was infeft in the lands in virtue of the precept of *clare constat* ; and as he and his successors had possessed them absolutely for forty years, without acknowledging the right of the vassal, the full property was thereby vested in their persons, and the *dominium utile* effectually consolidated with the superiority. And I may observe, in reference to another part of the present discussion, that the case of Bruce was a question among heirs.

LORD  
ELIBANK  
v.  
CAMPBELL.  
1838.

“ In the second case, Middleton’s, the Court found, in a question with a third party, ‘ that the right of the superior is a right to the lands *ex facie*, simple and absolute ; and as the right of the vassal is no more than a burden on the *dominium directum*, so, when the superior, in virtue of his infeftment in the lands, has had full possession of the *dominium utile* for forty years, without challenge or interruption, the vassal’s right is thereby totally extinguished, and the superior’s right effectually disburdened of it. His possession of the *dominium utile* for forty years is as effectual for extinguishing the right of the vassal, as a resignation made by the vassal.’ In this case, I may notice that Lord Braxfield and Mr. Lockhart were of counsel for the parties.

“ Looking to these decisions, I hold it to be clear, both on principle and authority, that Lord Elibank, the superior, by an exclusive possession of forty years, would have effectually worked off the prior grant of the feu-right to Mitchelson, supposing that Mitchelson had never granted a reconveyance of his base right. And it would be a very singular and anomalous result if the right of Lord Elibank was to be made worse than it was before, by the mere circumstance of Mitchelson’s executing a deed in his favour for the purpose of making it better. But I do not think that such a result is produced ; and I conceive that the entail now comprehends the *dominium utile* of Stantalane, just as much as if Mitchelson had never executed his reconveyance.

“ It is clear that the late Lord Elibank, but for the fetters of

LORD  
ELIBANK  
v.  
CAMPBELL.  
1833.

the entail, could have given a good title to Stantalane, both property and superiority, to a purchaser, even supposing his Lordship's titles to have been precisely on the same footing as that on which they were when he sold to the defenders. This is evident from the cases above quoted, and it is admitted, and even contended for by the defenders themselves, who maintain (as they must maintain) that their author, the late Lord, gave them a good title by his disposition in their favour. But if the late Lord's titles were such as to enable him to give a good conveyance to a purchaser, they must have been such as to vest the whole subject in himself. He could not convey to a purchaser what was not previously in himself. But so soon as this is kept in view, together with the fact that he had made up no titles except as heir of entail, the only remaining question comes to be, not whether he was invested in the property as well as the superiority, (for that is implied, if his conveyance would have carried both to a purchaser,) but simply whether the fetters of the entail were good to defeat a sale. And this point of the case has been previously disposed of.

"It has been pleaded, however, that there is no room for prescriptive possession in this case, *First*, Because there are no *termini habiles* for prescription *inter hæredes*, except in one special and limited class of cases instanced by the defenders; and, *second*, Because the Court cannot presume possession to have run on the tailzied title as against the unlimited title.

"In regard to the first plea, I think it erroneous in itself, and opposed to authority. The defenders admit that there is one class of cases at least, in which prescription may run on one title against another, even in questions *inter hæredes*. And the decisions instruct this to a larger extent than the defenders' admission concedes. Look, for instance, to the case of Bruce, above quoted, which was decided in 1770, and which was a question *inter hæredes*. And within four years thereafter, the Court decided the case of Middleton, also above quoted, which was a question with third parties; thereby evincing in the clearest manner, that the useful and important effect of prescription is not limited, as the defenders contend, but has place in questions *inter hæredes*, as well as with third parties. But besides this, I do not see that a proper question *inter hæredes*

LORD  
ELIBANK  
v.  
CAMPBELL.  
1838.

arises in this case, as there is no competition between heirs of different characters, but only between one heir and the purchaser from a preceding heir of the same kind. And, therefore, even supposing all the decisions which have been quoted on this branch of the defenders' case to be well founded, they do not appear to touch this cause: and I may add, that if the question were still an open one, I should doubt whether these decisions were in accordance with the principles of the law of Scotland, and the terms of 1617, c. 12.

“As to the second plea, that the Court cannot presume possession on the tailzied title against the unlimited, I think it is not well founded. In every question of evidence like this, the maxim applies, *presumptio cedit veritati*. Now I apprehend that the facts of the case amount to a complete proof that the possession was upon the tailzied title, and upon no other. The Lords Elibank feudalized that title, while they allowed the right under Mitchelson's reconveyance to remain a bare personal right, and one which they never took up. Under their feudalized right they could grant tacks, remove tenants, provide wives and children, and exercise every act of property not prohibited by the entail. Under the other, they could merely have drawn the rents payable by pre-existing tacks. Looking, therefore, to the fact that the Lords Elibank generally exercised all acts of proprietorship during the period of prescription, I conceive it to be no longer a question of presumption, whether they did so in virtue of the feudal title which they actually made up, or in virtue of any other. There was no other to warrant them in exercising the rights of proprietors; and when it is considered that they were bound by the entail to make up a feudal title as heirs of entail, I conceive it to be proved beyond question that their possession was exclusively applicable to their tailzied title, and to it alone.

“Upon these grounds, as well as upon those which have been already stated by your Lordships, I am of opinion that a complete feudal title under the entail was vested in the Lords Elibank prior to the accession of the late Lord, to all effects whatever, whether against third parties or against heirs. I consider the defences to be ill-founded, and that they ought to be repelled.”

## II.—BONTINE v. GRAHAM.

Aug. 6, 1840.

## NARRATIVE.

Robert Graham was superior under the Crown of the lands of Garchells. In 1708 he acquired the *dominium utile* of the lands from one Mary Hodge, whose conveyance in his favour contained a procuratory of resignation *ad remanentiam*, and also a precept of sasine. Neither of these was executed by Robert Graham, but he and his descendants continued to possess the lands until 1765, when Nicol Graham took infeftment under the precept of sasine contained in the conveyance to his ancestor by Hodge. In 1767 Nicol Graham executed a strict entail of the estate of Gartmore, including *per expressum* the lands of Garchells.

In 1816 the defender expedie a general service as heir-male of provision of his grandfather Nicol Graham, the entailer. He then brought a reduction of his grandfather's infeftment under the precept by Hodge as being irregular, and having himself taken infeftment under it he sold the lands of Garchells.

In 1828 the pursuer, being the next substitute in the Gartmore entail, raised an action of irritancy against him, in respect, *inter alia*, of his having sold the lands of Garchells.

ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—The entail of 1767 was in the form of a procuratory of resignation, and contained only the *dominium directum* of all lands in which the *dominium utile* was not consolidated with the superiority. This was the case with the lands of Garchells.

When Robert Graham acquired the *dominium utile* in 1708, he refrained from consolidating it with the superiority, which he could easily have done by executing the procuratory *ad remanentiam*; and in like manner every successor of his refrained from executing it. And although forty years elapsed before Nicol Graham executed the precept in 1765, that could not operate *ipso facto* consolidation, unless the heirs had actually both possessed and regarded the subjects as one undivided fee. But the contrary of this was proved to be the case by the conduct of Nicol Graham. He had better means of judging than any person now had, whether these two fees, *directum*

*et utile*, had been possessed as one, or had been kept separate ; and, knowing them to be separate fees, he expedie a sasine under the precept of Hodge : and though this was done in an irregular manner, and had since been reduced, it proved the non-consolidation of the fees at the date of executing the entail. And separately, even if the two fees had been consolidated, such infestment had, in the circumstances, the effect of separating them. The *dominium directum* of the lands was, therefore, alone contained in the procuratory of entail ; and thus the sale of the *dominium utile* was no contravention.

BONTINE  
v.  
GRAHAM.  
1840.

PLEADED FOR THE PURSUER.—Robert Graham was infest in the *dominium directum* of these lands when he onerously acquired the *dominium utile* in 1708. As, therefore, the full possession and enjoyment of the lands, and of every right of property therein, had always been concomitant with a feudal infestment in the *dominium directum et eminens* for more than forty years thereafter, the two estates were consolidated thereby as effectually as if the procuratory of resignation *ad remanentiam* had been executed.

ARGUMENT FOR  
PURSUER.

When, posterior to this, in 1765 Nicol Graham executed Hodge's precept of sasine, it produced no legal effect, and, in particular, it did not separate the *dominium utile* from the superiority. Besides, the defender Graham had farther rendered that infestment nugatory as in a question with him, by having had it reduced, which would have destroyed any effect of its preventing consolidation, if it could otherwise have had such effect. The *dominium utile* of the lands was therefore contained in the entail, equally with the *dominium directum* ; and as Graham made up a title to them in fee-simple, and sold them, he had committed an act of contravention, which was not, and could not be, purged.

LORD COREHOUSE, Ordinary, " Found that the defender had incurred an irritancy by alienating or putting away the lands of Garchells, part of the estate contained in the entail executed by Nicol Graham, Esq. of Gartmore, mentioned in the record, and therefore declared and decerned in terms of the libel."

BONTINE  
v.  
GRAHAM.  
1840.

In a Note to his interlocutor his Lordship observed,—“ It seems equally clear that the lands of Garchells were effectually entailed. The *dominium directum* of these lands had been in the family of Gartmore for a long period. In the year 1708 Robert Graham of Gartmore acquired the *dominium utile*; and both it and the *dominium directum* were possessed by him and his successors for a period of more than forty years before the entail was executed by his descendant, Nicol Graham. According to a fundamental and most expedient principle in our law of conveyancing, a consolidation of the superiority and property was thus effected; and it is thought that they were not afterwards separated by an unmeaning act of the entailer, who, long after prescription had run, took infeftment on the precept in the disposition by which the property had been conveyed to him. But whether they were again separated or not, it was manifestly the intention of the entailer to include them both in his entail. Indeed, the precept seems to have been executed *ob majorem cautelam* for that very purpose, and accordingly the dispositive words in the bond of tailzie apply equally to both. With regard to the lands of Gartinstarry, which hold of a subject superior, it is admitted that they are expressly entailed; but as there is a clause, providing that the heir shall possess by virtue of the entail, or by any other right in the entailer's person, it is argued, that the defender having completed his titles, not by executing the procuratory in the entail, but on a precept of *clare constat* from the superior, under the previous fee-simple investiture, he was at liberty to possess on that right, independently of the entail. It is thought that the clause founded on imports only that no heir should pass by the entailer, and make up a title to the exclusion of the entail; but by possessing on rights which were in the entailer's person, that he should subject himself to the obligations in the bond.”

JUDGMENT.  
March 2, 1837.

The defender having reclaimed, Cases were ordered, which were laid before the whole Court, and thereafter the Court “ Adhered to the interlocutor of the Lord Ordinary.”

House of Lords.  
Aug. 11, 1840.

The defender having appealed, “ It was Ordered and Adjudged that the interlocutors complained of be Affirmed.”

LORD BROUGHAM observed,—“ The *ipso jure* consolidation of the superiority with the *dominium utile* of the lands of Garchells by the possession of both for above forty years before the entail of Nicol Graham, seems to be satisfactorily established. Besides, the subsequent possession under these entails was justly regarded as of great importance. The unanimous judgment of the Court below ought therefore to be affirmed.”

BONTINE  
v.  
GRAHAM.  
1840.

LORD CHANCELLOR COTTENHAM concurred.

### III.—WILSON v. POLLOCK.

In 1715 John Warnock conveyed certain lands to his son John, reserving his own liferent. Infestment followed on the precept in this disposition in the same year. In 1725, on his father's death, John (2) was infest on a precept of *clare constat* as heir to his father. He died in 1744, and his son was also infest on a precept of *clare constat*, and was succeeded by his two sons successively in 1793 and 1794, who also made up titles in the same manner. In 1794 the lands were sold to Robert Wilson, who thereafter sold them to the defender in 1837. The defender objected to the title offered by Wilson, on the ground that a disposition by him would carry nothing but a mid-superiority of the lands, as the *dominium utile* had never been taken out of the *hereditas jacens* of John (2), who died in 1744. Wilson therefore raised an action, against the defender, concluding to have him decerned to pay the price, and to accept the disposition tendered.

Nov. 29, 1839.  
NARRATIVE.

PLEADED FOR THE PURSUER.—When the lands in question were purchased by the pursuer, he, looking to the records, saw a fee-simple infestment of James Warnock, not limited to a superiority, by having any feu-right excepted out of it, or otherwise, but bearing to be in the lands themselves. For above forty years back the authors of James Warnock stood similarly infest, on successive precepts of *clare*. The seller, therefore, exhibited a good prescriptive title to the lands themselves ;

ARGUMENT FOR  
PURSUER.

WILSON  
v.  
POLLOCK.  
1889.

and the purchaser, on obtaining himself infeft under a conveyance from the seller, possessed a real right in the lands, which was good against the world. The seller himself could not plead that his conveyance did not reach the *dominium utile*; no heir representing him could do so, and no heir could pass him by and attempt to take up the *dominium utile* out of the *hæreditas jacens* of John (2) without representing him, *quoad hoc*, as he had been above three years in possession. And if any adjudging creditor of the seller had attempted to carry off the *dominium utile*, the right of a purchaser relying on the records, which exhibited a prescriptive progress, would be safe from such a challenge. Whatever grounds of supposed challenge might be discovered by carrying an inquiry back beyond the forty years, the purchaser was entitled to meet by the plea of prescription, as barring all such inquiry.

But separately, assuming such inquiry to be admissible, it would in this instance be unavailing. Possession of lands for forty years upon a title to the *dominium directum* of these lands, (which was *ex facie* a title to the *plenum dominium*), presumed the consolidation of a base fee in the same lands, to which the party all the while had a personal right in him. This presumption was not taken off, but on the contrary was aided by the circumstance that both rights were equally unlimited, and descendible to the same heirs, as there was no doubt of its being beneficial to the party to have two such fees consolidated, and no ground to doubt of his wish and intention being to regard them as one estate.

This was not the case of a party having double titles, equally unlimited, to one and the same estate. In such a case it had been decided that possession on one of these titles did not infer prescription against the other, because the possessor had no interest that his acts of possession should be ascribed to the one title rather than the other. In the present case there were two distinct fees, with only one title to each. Many acts of ownership could only be validly performed by a proprietor infeft. Infestment was taken in the *dominium directum*, and all acts of ownership, as regarded the exercise of property in the lands, were performed as fully as they could be by one infeft in the *plenum dominium*. For the validity of many of these actings,



it was the interest of each heir for the time that they should be ascribable to his real title, and not to his apparency.

WILSON  
v.  
POLLOCK.  
1839.

PLEADED FOR THE DEFENDER.—By the infestment of John (2) under the contract of marriage, a base fee was created in his person. That infestment was never confirmed. On the death of his father John (1) in 1725, he obtained a precept of *clare constat* from the superior, and was infest as heir to his father; but that only carried the mid-superiority, he being already infest base in the *dominium utile* under the conveyance in the marriage-contract, and there being nothing left in his father's *hæreditas jacens* but the mid-superiority. These two distinct feudal estates of property and of mid-superiority being thus constituted in the person of John (2), there could be no consolidation of them but by the execution of a resignation of the property *ad remanentiam*. John (2) never executed such resignation. None of the succeeding heirs ever did so, or were ever in the right to do so, as none of them ever made up a real title to the property of the lands, which was left in *hæreditate jacente* of John (2); his successors having merely expedite precepts of *clare constat*, which stated each of them successively in the real right of the mid-superiority, and nothing more.

ARGUMENT FOR  
DEFENDER.

As no consolidation had been effected by resignation *ad remanentiam*, the only other point to be considered was, whether prescription could be availably pleaded by the pursuer. But this could not be done, because, from 1725 downwards, John (2) and his successors had had a double title in them, both titles being equally unlimited, and both descendible to the same heirs. It is true that the successors of John (2) made up a real title only to the mid-superiority, but they had a personal title, on apparency, to the property. Their possession could not be ascribed to their real title, in opposition to their personal title, because there was no adversity between these titles, and there were, therefore, no *termini habiles* for a course of prescription running on the one title against the other, because no man could prescribe against himself. The series of decided cases as to possession upon non-repugnant double titles, therefore, applied; and, although more than forty years had run from the death of John (2), still no course of prescription had run against the

WILSON  
v.  
POLLOCK.  
1839.

existence of the base fee as a separate estate, but the two fees remained as distinct at the date of the sale as they did at the death of John (2) in 1744.

JUDGMENT.  
Nov. 29, 1839.

The Court “Decerned in terms of the libel.”

OPINIONS.

LORD GILLIES.—“I am clearly of opinion that the title offered by the pursuer is good. I have stated the grounds of my opinion in the case of Lord Elibank, quoted in these papers, and I think it unnecessary to repeat them now.”

LORD PRESIDENT.—“I am of the same opinion. It is quite a mistake to speak of infeftment in the superiority merely. The infeftment is in the lands themselves. Where there has been no subinfeudation, that infeftment carries the lands out and out. And if infeftment in the *dominium directum*, that is, in the lands themselves, be followed by possession for forty years, that will be a good title to the lands out and out, notwithstanding the existence of a personal right to a base fee being all the while in the person of such possessor. It was so decided in the case of Lord Elibank in 1837, and in the case of Walker in 1827, besides other cases. I have no doubt that the title offered by the pursuer is perfectly good.”

LORD MACKENZIE.—“I am of the same opinion. It must be admitted that this department of the law is involved in great difficulty, so far as regards legal principle. But I apprehend that there are decisions quite in point, which we ought to follow in giving our present judgment. The precise scope of these decisions ought, however, to be carefully defined. It appears to me that they go this length: where a party is infeft in the *dominium directum*, and has also a right to the *dominium utile*, but standing on mere apparency, and where both of these rights are equally unlimited, and are descendible to the same series of heirs, there the possession of the party for forty years upon his real right will operate consolidation of the *dominium utile* with the *dominium directum*, by the aid of the positive prescription. This takes place, I apprehend, upon the ground that the party never made up a title in the vassalage, and that his possession was such as suited full possession of the lands out and out upon the title to the *dominium directum*. Indeed, it is not easy to

WILSON  
v.  
POLLOCK.  
1889.

see how it was possible that such possession of the lands should not have been, in some way, inconsistent with the character of mere apparency. The party could hardly fail to have done some acts during the forty years which would not be valid if done by one in mere apparency, and which should be exclusively ascribable to possession as on a real title. In this instance, one act exercised by the party in possession was an actual sale and disposition of a parcel of the lands out and out in 1794. But I think some of the cases quoted do not seem to require so much as that. Nothing could be stronger, as to the doctrine now under consideration, than the case of Bontine : for it was there held that consolidation had taken place, to the effect of bringing lands within an entail, and exposing an heir to a declarator of irritancy for selling them. Lord Corehouse and the whole Court supported the doctrine of consolidation having so taken place, to that full extent, in that case. After it, I can have no doubt that the pursuer in this action offers a good title to the defender. The only thing which occasions any puzzle is to reconcile the cases of Lords Elibank and Bontine, on the one hand, with those of Smith and Durham, &c., on the other. It would not be easy to do that : but neither is it necessary to do it. I see that Lord Gillies, in a former case, has pointed out some ground of distinction between them, and I incline to take it for want of a better ; it is, that where the destination in one of the titles is different from that in the other, it would be dangerous to hold that the mere possession of a party, who is himself heir under both, should be held intended to operate a change in the dominant destination of the estate. Having full power to change the dominant destination by a deed at any time, it seems to have been presumed that had he intended to change it, he would do it at once by a deed for that purpose, and that he would not resort to a prescriptive possession of forty years upon one title, as the method of changing the destination under the other.

“ I would, therefore, propose to limit the doctrine of consolidation, now under consideration, to the case where the two fees stand destined throughout to the same series of heirs ; for in that case the heir possessing on the title to the *dominium directum* must have been benefited by working off the vassalage,

WILSON  
v.  
POLLOCK.  
1839.

and there is no room for doubting that his intentions went that length."

LORD FULLERTON concurred, and observed, "That he could see no ground whatever for doubting that the title offered to the purchaser was perfectly safe and unchallengeable."

1. In the case of HARVEY v. WILSON, January 29, 1822, certain lands were disposed by John Wilson in 1704 to his son Patrick, who was infest base. On Patrick's death his daughter Janet passed by her father and was infest, in 1721, on a precept of *clare constat*, as heiress of her grandfather. In 1731 she conveyed the lands to her husband, Henry Wilson, who was infest base in 1735. In 1793 his son Patrick (2) was infest on a precept of *clare constat* as heir of his mother, and by a deed of settlement he conveyed the lands to trustees. After his death his son Robert was served heir of provision to his grandfather Henry, and Henry's infestment on his marriage-contract was confirmed. He was also infest on a precept of *clare constat* as heir of Henry, and Patrick's (2) infestment as heir to his mother Janet was reduced. The lands having been thereafter sold, the purchaser brought a suspension for the purpose of having the validity of the title determined. LORD PITMILLY, Ordinary, "Found that the infestment in favour of Janet Wilson in 1721, proceeding on a precept of *clare constat* granted to her by

the superior, as heir of John Wilson, her grandfather, having been followed by long possession, was secured by prescription, and established in her person a valid title to the lands of West Bowfield, notwithstanding of the infestment in 1704 in favour of the first Patrick Wilson, on which no other titles followed, and which was extinguished by prescription, and cut off by the subsequent titles in favour of Janet Wilson, and prescription following on them; That the said Janet Wilson having, in 1731, conveyed these lands to her husband, Henry Wilson, by a contract of marriage which contained both procuratory and precept; and he having been infest on the precept in 1735, and his grandson, Robert Wilson, having been served heir to him, and thus having acquired right to the unexecuted procuratory; but in place of expeding a charter of resignation, having obtained a charter of confirmation of his grandfather's infestment from the superior, along with a precept of *clare constat* in his own favour as heir of his grandfather, in which he was infest, a valid title to the lands was thus established in favour of Robert

Wilson." The pursuer having reclaimed, the Court "Adhered."

2. In the case of *WALKER v. GRIEVE*, February 27, 1827, David Beatson (1) was infeft in 1730 in certain lands under a feu-charter. He afterwards obtained a disposition of the same lands with a double manner of holding, and upon the procuratory he expedite a charter of resignation, on which he was infeft in 1737. In 1749 he disposed the lands to his eldest son, David Beatson (2), who was infeft on the precept in the disposition. In 1787 David (2) disposed them to his eldest son David (3), who took infeftment on the precept, and then, in 1813, expedite a Crown-charter of confirmation of his own and his father's infeftments. The lands having been sold, the purchaser objected to the title, on the ground that by David's (1) base infeftment in 1730, the *dominium utile* had been separated from the *dominium directum*, and that as no consolidation of the two had ever taken place, the *dominium utile* or property still remained *in hæreditate jacente* of David (1). It was answered on the part of the trustees on the bankrupt estate of David (3), that as the lands had been possessed since 1737 on titles *ex facie* absolute, the feu-contract was extinguished by the negative prescription, and the seller's right to the lands had been fortified by the positive prescription.

3. The Court repelled the purchaser's objections to the title offered. LORD BALGRAY observed,

—"The very point in question was decided in a case which has not been noticed by the parties, *Bruce v. Bruce*, Dec. 6, 1770, and which was affirmed on appeal. In that case the Court were clearly of opinion, that although there had been at one time a separation of the property and superiority, yet as the title conveying the superiority included the whole lands, and was *ex facie* applicable to the property, and as there had been more than forty years' possession, this was a sufficient prescriptive title." LORD CRAIGIE observed,—“I certainly was of opinion that the objection was good, and I rested it upon the case of *Bald v. Buchanan*; but I have been a good deal affected by the decision referred to by Lord Balgray." LORD GILLIES observed,—“In the case of *Bald* there was no prescriptive possession." LORD PRESIDENT HOPE observed,—“Independently of the authority referred to, I am satisfied that the objection is not well founded. It is a mistake to say that a party is infeft in the superiority. He is not so: he is infeft in the lands themselves, and that infeftment forms a good title of possession on which he may found prescription. So much is this the case, that if a feu-right be granted, it merely creates a burden which may be extinguished by a resignation *ad remanentiam*, without any new infeftment being taken, because the party is already infeft."

4. In the case of *WADDELL v. POLLOCK*, June 29, 1828, John Jameson, in 1754, in the marriage-

contract of his grandson John Jameson (2), disposed certain lands to him, and to the "child or children of the marriage;" and on the precept contained in the contract the grandson was infeft base. In 1763 the grandson died, leaving five children. His eldest son John (3) entered into possession of the whole lands without regard to the destination in the marriage-contract, which was to the "child or children of the marriage," but he made up no title till 1810, when he was infeft on a precept of *clare constat* as heir to his grandfather John (1). In 1822 the lands were sold, when the purchaser objected to the title offered. He PLEADED,—By the infeftment of John (2) on the marriage-contract of 1754, a base fee was created in his person, and John (1) was divested of the property, and thenceforward retained only a mid-superiority. When John (3), therefore, entered into possession in 1763, he had in his person a right of apparenacy as heir to John (1) in the mid-superiority, and a right of apparenacy to the property as heir under the marriage-contract, which must be construed, in regard to an heritable subject, as destined to the heir of the marriage; and so having in his person two unlimited titles, he could not, when he obtained infeftment in 1810 on a precept of *clare constat* as heir to John (1), attribute his previous possession on apparenacy to that right; and he consequently had not a prescriptive title to the *dominium utile* vested by the infeftment on

the marriage-contract in the person of John (2). Besides, even supposing that the destination of the base fee under the contract carried it to the whole children, so that there were not two titles in the person of John (3), still his apparenacy being only to a mid-superiority, possession on such apparenacy was not available as to the property; and further, the possession on apparenacy was not available to validate the title made up in 1810, because there was no infeftment subsequent to the marriage-contract from which to deduce the possession. The seller PLEADED,—The destination in the contract of marriage agreeably to the doctrine recognised in the case of *Duncan v. Robertson*, Feb. 9, 1813, carried the base fee thereby created to the children of the marriage generally; and consequently the possession of John (3) could only be attributed to his title as heir-apparent to John (1), the only title to the whole lands truly in his person. This possession, however, of more than sixty years, having the previous infeftment of John (1) in 1714 to warrant it, would have been effectual to produce a prescriptive right, even if no infeftment had followed in the person of John (3); but he having connected his title with that of John (1) by the precept of *clare constat*, and infeftment in 1810, beyond all doubt completed a prescriptive title to the property, possession on a title to the *dominium directum* being sufficient to acquire the *dominium utile* which

had been separated by subinfeudation. John (3), therefore, having thus acquired a valid right to the *dominium utile* by the positive prescription, the right of the children of John (2) under the marriage-contract was cut off by the negative.

5. LORD CRINGLETIE, Ordinary, repelled the reasons of suspension. In a Note he observed,—“ The Lord Ordinary is quite aware that, according to the law of Scotland, as settled by the judgments of this Court, and in the House of Lords, it is fixed, that if a man have two unlimited titles to any landed property, they will both subsist, and none of them will be affected by the negative prescription. This has been set at rest by *Smith v. Bogle*,—*Durham v. Durham*, affirmed in the House of Lords,—*Yuille v. Morrison*, 4th March 1813. But it is equally ascertained, that if any of the titles held by the same person contain fetters or restraints, it is competent to plead positive prescription on an unlimited title to cut off the other by the negative. In this case, if the destination in the marriage-contract of John the second sent the half of Bogton to the heir of the marriage, then it subsists at this hour in the person of John the third, and is not cut off by prescription; but if, on the contrary, the destination carried the subject in shares to his brothers and sisters, leaving him only a share, then the Lord Ordinary is of opinion that their rights may be lost by the negative prescrip-

tion, provided the positive prescription in favour of John the third can be pleaded by the respondents. On this point, the Lord Ordinary holds that two particulars are settled, viz., *first*, That possession of the whole of a subject on charter and sasine, or a complete right by service or precept of *clare constat* and sasine, without interruption for forty years, will carry a prescriptive right to the property, although the investiture was only of the *dominium directum*, and the property had been separated from the superiority by subinfeudation. This was decided so lately as 27th February last (1827), *Walker v. Grieve*, in conformity to *Bruce v. Bruce*, 16th December 1770, affirmed on appeal. *Second*, The second particular now fixed is, that possession, in virtue of appearance as heir, is reckoned in prescription when the apparent heir by infestment connects himself with the former investiture of his ancestor. In this case it is an ascertained fact, *first*, That John Jamieson the first had a complete public right to the subject in question. *Second*, It is also ascertained that the property was separated from the superiority by base infestment on the contract of marriage of John the second. *Third*, That he having died in 1763, the subject was possessed by John the third down to 1823—sixty years—without interruption. *Fourth*, That John the third obtained a precept of *clare constat* from the superior in 1810, on which he was

infert, and connected himself with the public infertment of his great-grandfather ; and consequently he is held in law to have possessed the lands on investiture thereof for sixty years."

6. The purchaser having reclaimed, the Court "Adhered." LORD GLENLEE observed,—“ No doubt, where two unlimited titles rest in one person, the one cannot prescribe against the other, as there is no ground to impute the possession either to the one or the other. But when one of the titles is not in his person, and he has only one title, we must impute the possession to that ; and that was the case of John third. If the marriage-contract carried the property to the children equally, he had no title under the contract, while he had one as heir to his grandfather in apparency ; and that was a good title, unless the base title can be set up against it. Now it is perfectly understood that possession on apparency, founded on a prior infertment, is perfectly good ; and I think it even has been found to be so where no subsequent infertment had taken place. So far, therefore, as regards prescriptive possession on apparency, there has been sufficient here ; and John third is now entitled to plead the negative prescription against the marriage-contract, because his own right is fortified by the positive. If, under the marriage-contract, the fee fell to John second, no doubt the title would be very incomplete, and it would be necessary to complete titles to

the base fee ; but, being otherwise, the title is sufficient."

7. LORD ALLOWAY observed,—“ I must first state my opinion on the original destination in the marriage-contract, on which the question of prescription will depend. On that, my opinion is the same with that expressed by Lord Glenlee in the case of Robertson—that if the terms ‘ bairns ’ or ‘ children ’ are used, it would carry the property to the children equally, ‘ children ’ being clearly the same as ‘ bairns ; ’ and if, in the case of Robertson, the word ‘ heirs ’ had not been used, the decision would here have been quite the reverse of what it was. Here, however, the eldest son took possession in 1763, and has possessed down to the sale. None of the difficulties in the case of Gray, &c., occur here ; for here is a person in possession of the ground, with a right to only a fifth of the property under the contract, and his sisters had a right to four-fifths. Now, there has been a possession adverse to the right under the contract for sixty-eight years, and prescription has therefore run against them. There may be cases, however, where, from minorities, that will not do. That is possible, but twenty-one years for minorities, in addition to the forty years, *ex facie* give a reasonably good title ; and certainly the negative prescription has excluded all right under the contract. But there is another principle where I have still some difficulty, viz., as to positive prescription. I am well



acquainted with the case of *Caitcheon v. Ramsay*; but there is a difference here, and I doubt how far we can apply the Statute to a case where infeftment did not take place till 1810, which is the only title of possession. John third had no title till that. There is no occasion, however, to determine that question, because, if it is clear that the interest of the other children under the contract was cut off by the negative prescription, that is sufficient without having a title on the positive, as he has made up a title connecting with that of John first. This is perfectly sufficient for the decision."

8. LORD JUSTICE-CLERK BOYLE observed,—“ I take it for granted that the marriage-contract carried the property to the children equally; and doing so, I am clearly of opinion that the title should be sustained. The seller refers to an infeftment taken by John first in 1714, and founds on possession, beginning by John third in 1763, down to this hour; and then, even though he had made up no title to the last heir, his possession might be founded on to make out prescriptive title on the authority of the case of *Caitcheon*. Possession on apparency was held to be sufficient there, and in the other previous cases there referred to. Now this is stronger, as all doubt of John third's character as heir-apparent is removed by the precept of *clare constat*, and infeftment following; and therefore it is clear that the positive prescrip-

tion has run in his favour; and on the other hand, the right of the children has been cut off by the negative prescription."

9. In practical conveyancing, the principle that a base fee may be extinguished by possession for forty years on a title to the superiority, where both the *dominium utile* and the *dominium directum* are vested in the same party, is so important, that it may be doubted whether the suggestion of Lord Mackenzie in the case of *Wilson v. Pollock* ought to be adopted. It may be inconsistent with the nature of prescription to allow that principle of law to be applied to such cases at all, but if it is to be applied, it may be doubted whether its application should be restricted to the case where the heirs under the two titles are the same. The better course would seem to be to allow prescription to effect a consolidation of the property with the superiority in every case, whether the heirs under the two titles are the same or different. The difficulty which Lord Mackenzie felt in reconciling the case of *Durham v. Durham* with those cases in which consolidation was allowed to be effected by prescription without a resignation *ad remanentiam*, is to some extent removed by the consideration, that in the case of *Durham* there was nothing to be gained by the party in possession, and therefore it was not to be presumed to have been his wish that the personal title which he had to the estate should be extinguished. In the case of *Durham*

there was but one estate and two titles to it. In those cases, however, where consolidation is sought to be effected by prescription, there are two separate estates and one title to each, and the object gained by the party possessing on the title of superiority is, that the two estates are consolidated. This is an object which it may easily be presumed to have been the

wish of the party possessing to effect, and the circumstance of the heirs in the two titles being different, seems to afford no ground for preventing the consolidation being effected, now that the principle of prescription has been allowed to be applied to those cases where the destination in the two titles is the same.

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## PRESCRIPTION OF RETOURS.

*All challenge of Retours is barred by the vicennial prescription, as well in the case of heirs of provision as of heirs jure sanguinis.*

### I.—NEILSON *v.* COCHRANE'S REPRESENTATIVES.

IN 1802 John Neilson executed a settlement of his lands in <sup>March 19, 1840.</sup> favour of James Cochrane. Having died within sixty days of <sup>NARRATIVE.</sup> the date of the settlement, it was liable to be challenged on the head of deathbed. In 1809 James Neilson expedé a general service as heir to John Neilson, and granted to Cochrane a ratification of the settlement.

In 1833 the pursuer expedé a service as nearest lawful heir-of-line and conquest to John Neilson, the maker of the settlement, and he thereafter brought an action of reduction, concluding to have the conveyance to Cochrane reduced on the head of deathbed, and also concluding for reduction of the service of James Neilson, and of the deed of ratification granted by him in favour of Cochrane. The defender pleaded that the action was barred by the vicennial prescription.

PLEADED FOR THE PURSUER.—The vicennial prescription of <sup>ARGUMENT FOR PURSUER.</sup> 1617, c. 13, was a mere extension of the triennial prescription of 1494, c. 57, and applies only to actions of error against the inquest. The Statute 1617, in the immediately preceding chapter to that creating the vicennial prescription, renders it neces-

NEILSON  
v.  
COCHRANE'S  
REPRESENTA-  
TIVES.  

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1840.

sary that a party setting up a title against the true owner of land should have possessed upon the title set up by him for forty years. In the present case there has been no such possession. To hold then that a party who has simply expedé a general service, without the adverse possession required by the twelfth chapter, is entitled to prevent the true owner from vindicating his right, would be to make these two provisions utterly inconsistent with each other, or, in other words, to make the provisions in the thirteenth chapter entirely supersede those of the twelfth, without the slightest apparent intention in the Legislature so to do.

But, again, the nature of the service which was expedé must be borne in mind. It was not a case of special service, where the party tries to connect himself with the lands. It was a mere general service, under which nothing is transmitted but personal rights to lands not clothed by infeftment. It is well known that these general services are almost invariably carried through without any opposition, or any one to watch the proceedings, and if they are not reducible after twenty years, there is scarcely an estate in Scotland which would be safe from this course of proceeding, and, at all events, the most serious consequences must follow. If, in a proceeding not watched, and having no other effect but to pass personal rights to lands, and not followed by any visible act of possession, all parties are excluded from challenging by the mere lapse of twenty years, the law of prescription would be a downright mockery. Indeed, it might actually happen that the true heir had had the possession during the whole twenty years, but from negligence or ignorance had allowed an inept retour to stand unreduced in the person of another. If a retour alone could be reared up into a valid title to the party served without further evidence or documents, what becomes of the well-known maxim, "*nulla sasina nulla terra;*" or what indeed becomes of the whole doctrine of the positive prescription of forty years? In fact, if the plea maintained on the other side were sustained it would annihilate the forty years' prescription of land-rights altogether.

The point in question was fully considered in the Bargany cause, and the dicta of the Judges in that case entirely favour the view now maintained. A mere general service is not one

of the rights forming the title to property, a sasine proceeding upon a retour, as referred to in the Statute, is a sasine proceeding upon the retour of a special service ; a general service is not in itself, like a special service, the warrant of sasine ; and hence, even if the appellant should be held as excluded by the terms of the thirteenth chapter of the Statute from reducing the general service in question, that would in no degree prevent him from challenging the sasine proceeding on the disposition and settlement executed on deathbed, unless forty years' peaceable possession thereon can be established by his opponent.

NEILSON  
v.  
COCHRANE'S  
REPRESENTA-  
TIVES.  

---

1840.

PLEADED FOR THE DEFENDER.—The words of the Statute 1617, c. 13, either taken alone or in connexion with the terms of the Act 1494, sufficiently demonstrate that their application was not limited to actions against the inquest for error.

ARGUMENT FOR  
DEFENDER.

The import of the 12th chapter of the Statute of 1617, is to prevent the true owner of property from challenging a defective title, after the party having the defective title has been in possession, by virtue of a sasine or sasines, for forty years. The import of the thirteenth chapter was simply to render the facts found by a jury under a service indisputable after the lapse of twenty years. The object of the Statute introducing the prescription of forty years is the protection of land-rights, and of the title by which lands are held against all objections whatever. The view of the Statute is to render the whole title, after the lapse of the prescriptive period, unchallengeable upon any ground whatsoever. After the forty years have run upon the title, it is sustained by the law in the face of all alleged defects, and against all claimants whatsoever. The Act requires an infestment ; and not only so, but an infestment on a previous warrant. And although the Act refers to sasines on retours, as well as other previous titles, it does so with no particular reference to the case of retours as such, but merely as the warrants of the infestment ; inasmuch as the Act did not intend that a sasine without a warrant should be effectual, as the basis of prescription. If there has been a possession for forty years, upon an infestment following on a regular warrant, whether retour or any other, the whole right to the lands stands secure by virtue of this Act.

NEILSON  
 "F."  
 COCHRANE'S  
 REPRESENTA-  
 TIVES.  
 1840.

The other and separate Statute now under consideration was enacted for a totally different purpose from that of introducing a prescription, by which the whole feudal title should be rendered secure against all objections whatever. It does not enact, nor was it intended to enact, that a retour with twenty years' possession should give a title to lands incapable of being challenged upon any ground whatsoever. Except in its incidental and collateral results, the Statute does not affect the feudal title to lands at all. All to which the Statute has reference is the mere matter of propinquity,—an isolated fact, which may no doubt be intimately connected with the title to land, but may also, as in the case of peerages, and titles or offices of honour, be of vast importance even where no land is in question. And in regard to this fact, the Statute declares, on motives of very obvious expediency, that if it is fixed by the verdict of a jury it shall be held after the lapse of twenty years to be fixed beyond challenge, against any person coming forward with an opposite allegation. Nothing is more alien to its words or manifest intention, than to say, that merely because the retour is unchallengeable on the point of propinquity, therefore the whole feudal title to the lands is, *de plano*, to become a valid heritable right. So far as the retour might be subject to challenge by a person claiming to be a nearer heir, that particular step in the progress is no doubt secured by the Act. But all other objections to the title, of whatever kind they may be, remain open exactly as before, and will still do so, until the whole title becomes fortified by the long prescription.

There is not, therefore, the slightest collision between the Act 1617, c. 12, introducing the long prescription of forty years, and the Act 1617, c. 13, enacting the vicennial prescription of retours now contended for. The latter Statute merely introduced a qualification on the immediately previous Act, to the effect that where a service formed part of the feudal title, that service should, on a sound consideration of the fleeting nature of human testimony, be held after twenty years to be incapable of reduction, at the instance of any person, alleging that he himself, and not the person served, was the true heir. But to this effect, and to this effect only, does the last Statute operate; and this plainly involves no collision or contrariety

between the two Statutes, but leaves them to act in perfect harmony, according to the entirely consistent views of policy on which they were respectively framed.

The Bargany cause clearly cannot have the slightest application to the present case; for there the parties, so far from disputing the retour, respectively founded upon the facts thereby found as the ground of their conclusions in point of law.

NEILSON  
v.  
COCHRANE'S  
REPRESENTA-  
TIVES.  
1840.

LORD COCKBURN reported the cause to the Second Division of the Court, when the opinions of the other Judges were directed to be taken.

The following Opinion was returned by LORD PRESIDENT HOPE, LORDS BALGRAY, GILLIES, MACKENZIE, COREHOUSE, FULLERTON, JEFFREY, and COCKBURN :—" We have considered the cases given in by the parties, and the interlocutor of the Second Division of the Court, of date 14th May 1835, and we consider that the conclusion in favour of the defenders is unavoidable. The Act 1617, c. 13, ' statutes and ordains that the said Act of Parliament' (referring to the Act 1494, c. 57,) ' shall noways hurt nor prejudice the nearest of kin to seek reduction of the saids retours and service to be past and expedite in time coming, and that within the space of twenty years immediately following the date of the saids retours and services; and if the saids summons of reduction be not intended, executed, and pursued before the expiry of the said twenty years, that the said action of reduction of the said retour and service, shall prescribe in the self, and no party to be heard thereafter to pursue the same reduction. The terms of the Act appear to be clear and unambiguous, particularly when considered in reference to the Act 1494, to which it alludes.

OPINIONS.

" It is very difficult to conceive that the framers of the Act 1617, c. 12, intended by the Act, c. 13, both passed, it may be said, on the same day, to alter, vary, or to do anything inconsistent with the object of the other Statute. The Act, c. 12, declares, that where a title is produced, followed by infestment, and clad with possession for forty years, the same shall create a good, valid, and sufficient right. The title referred to is either a direct conveyance or a retour, or a precept of *clare*. The

NEILSON  
v.  
COCHRANE'S  
REPRESENTA-  
TIVES.  
1840.

Act, c. 13, relates solely to one of the titles referred to in the Act, c. 12, and there appears to be no inconsistency in declaring, that a particular title shall be held, after a certain period of time, unobjectionable and unchallengeable. This forms but one element of the Act, c. 12 ; and the other requisites must concur before the benefit of the Act can be obtained.

“ When the difficulty of establishing propinquity is considered, which in most cases depends upon human testimony, it does seem highly expedient and just to limit the period within which a service can be set aside, and the party of new called upon to undertake a probation ; and we are persuaded that this was the view of the Legislature. We are the more confirmed in this view of the Statute from considering what is laid down by our institutional writers from an early period, and uniformly adhered to. These are distinctly laid down in the case for the defenders, from page 10 to page 16. These cannot be disregarded. The unfrequency of discussion on this point, and the paucity of decisions, seem to indicate an acquiescence of the profession and of the public in the opinion given out by the professed authors on the law, in so clear and in so decided a manner. The case referred to by M'Kenzie, 22d November 1665, *Younger v. Johnston*, was not then decided, but it was finally determined 28th November 1665, *Stair's Decisions*, vol. i. p. 315, and there the Court were of opinion and found ‘ the reduction of retours to prescribe sooner than other right.’ We consider the case of *Bargany* to be in no ways applicable to the present. It was a very peculiar and circumstantial case. The retour in that case was of so singular a nature as to bear *in gremio* a complete explanation.

“ Upon the whole, therefore, we are of opinion, that in a question with heirs, the Act 1617, c. 13, applies, and that the defender is entitled to plead the benefit thereof. We may add, in conclusion, that as to all the consequences that may be deducible from this unavoidable interpretation of the law, we cannot prejudicate ; that must be left, if required, to Legislative interference.”

The following Opinion was returned by LORD MONCREIFF :—  
“ Though it is not without considerable difficulty, I concur in



the result of the above-written opinion. But as I cannot concur in the view taken in it of the Statute 1617, c. 13, I think it proper to explain the ground of my opinion.

“ The institutional writers have been greatly at a loss to determine what is the precise meaning and effect of the Act 1617, c. 13, so as to render it not inconsistent with the immediately preceding Statute 1617, c. 12. This last Act provides, that men shall not be disturbed in the enjoyment of their estates, who have bruiked or possessed them by virtue of infestments made to them by the King, or other superior or author, ‘ for the space of forty years,’ provided they can produce either a charter preceding the entry of the forty years’ possession, with sasine on it, or where there is no charter, instruments of sasine ‘ standing together for the space of forty years, either proceeding upon retours or upon precepts of *clare constat* ;’ which rights are declared to be ‘ valid and sufficient rights, being clad with the said peaceable and continual possession of forty years, without any lawful interruption,’ &c. The Act 1617, c. 13, on the narrative of the Act 1494, by which summonses of error against the determinations of inquests were declared to prescribe, if not pursued within three years, provides that that Act shall not prejudice the nearest of kin to seek reduction of such retours within twenty years, and that if the summons ‘ be not intended, executed, and pursued within the space of twenty years,’ &c., the action of reduction shall prescribe, and no one be heard to insist in it.

“ I cannot think that the second of these Acts has an indiscriminate application to all retours, or to all grounds of challenge, or that the two Acts can be reconciled, simply on the ground that the last relates only to one of the titles mentioned in the first. For to say that two or more infestments, proceeding on a retour of service, and clad with forty years’ possession, (as equivalent to charter and sasine with forty years’ possession,) shall secure the party against every challenge of his title—and to say that a retour alone, with or without sasine, by the mere lapse of twenty years, shall in every case secure a party against any challenge of that title, appears to me to involve a contradiction in principle which the framers of the first Act cannot be supposed to have intended. And it farther appears to me, that

NEILSON  
F.  
COCHRANE'S  
REPRESENTA-  
TIVES.  
1840.

NEILSON  
v.  
COCHRANE'S  
REPRESENTA-  
TIVES.  

---

1840.

such a construction of the Act is not reconcileable with the opinions delivered in the case of Bargany.

“ In general I think that the Act, in the restraining part of it, was intended to protect the parties once served against the necessity of again producing, after twenty years, the proofs of their propinquity in blood to the deceased. Taking this to be the effect of it, though it may also protect against irregularities in the proceedings, I think, though with difficulty, that it must secure the retour in this case against the particular ground of challenge brought against it. My cause of difficulty is this :— The pursuer does not object to the statement of James Neilson's propinquity to John Neilson in Brownside, from whom he drew his descent ; he only says that that descent was through the second son of John, while the pursuer is descended of Matthew, an elder son ; and if the direct case be put, that A obtained a service as heir of his father, and that after twenty years B, stating himself to be an elder son, absent perhaps at the time, challenged the retour, I should have hesitation in saying that the door was shut against his plain right by the vicennial prescription. I am aware, however, of the case of *Younger v. Johnston*, 22d November 1665, and what Mackenzie has said on it in his supplemental note, and only mean to express a doubt on the principle.

“ But I am of opinion, that in this case the retour of James Neilson is of such a nature, according to the statement in the record, as necessarily to bring it within the statutory prescription. He is served nearest heir as being the grandson of John Neilson. In this it is implied, that his father was either the eldest son or the eldest who has left descendants ; and as the name of his father does not appear, the ground of challenge set forth in the summons and record is truly an impeachment of the propinquity on which he has been served. I therefore concur with the other Judges in thinking that in this case the action is barred by the Statute.”

At the advising LORD JUSTICE-CLERK BOYLE, and LORDS GLENLEE and MEADOWBANK, stated that they concurred with the majority.

LORD MEDWYN observed,—“ If a retour be followed by pos-

session I can understand prescription being applied to it. But as to latent general services, I cannot suppose that it was ever intended that these should prescribe by the mere lapse of twenty years. The two Acts I look upon as parts of the same law, and I conceive the retours mentioned in the second Act are retours of the kind mentioned in the first, as forming a title of possession. Here, I think, there was possession as validating another title. I also conceive interruption would apply to such a case. I concur, however, in the result, though I would wish to guard my opinion."

NEILSON  
v.  
COCHRANE'S  
REPRESENTA-  
TIVES.  
1840.

The Court "Sustained the defence of vicennial prescription." JUDGMENT.  
Jan. 17, 1837.

The pursuer having appealed to the House of Lords, "It was Ordered and Adjudged that the interlocutor complained of be Affirmed." House of Lords,  
March 19, 1840.

LORD CHANCELLOR COTTENHAM.—"My Lords, the question in this case was, whether twenty years having elapsed after service of James Neilson of Newland Craigs, as heir to John Neilson of Linwood, there were any provisions under the Scotch Acts, to which I shall have occasion to refer, that would bar the remedy of the present appellant, who now claims to be the true heir to that person.

OPINIONS.

"It appears that John Neilson of Linwood, in the year 1802, executed a conveyance of certain estates to a person of the name of James Cochrane, a farmer at Linwood, upon trusts stated in the conveyance. From 1802 to the present time the parties claiming under this conveyance have been in possession of the property. But the question has arisen, whether this conveyance can be reduced, or whether the pursuer is not barred from reducing it by the effect of prescription?

"In 1809, James Neilson of Newland Craigs claimed to be the heir of John, and if so, he was the person authorized to dispute the title. He was served heir to John, and retoured as such. Having so far established his title as heir, he confirmed the deed. This was in 1809, and in 1833, the appellant setting up his claim as heir to John, got himself served heir, and instituted the action out of which the present appeal has arisen,

NEILSON  
v.  
COCHRANE'S  
REPRESENTA-  
TIVES.  
1840.

for the purpose of reducing the service in 1809, being then above twenty years' standing.

" My Lords, by a Scotch Act, in 1494, only three years were allowed to a party to dispute the service of another as heir to a person deceased ; and that was to be done under a process then existing, which was a process of error inputing to the jury that they had returned an illegal and unfounded verdict, so that the jury themselves might upon that process come in and defend the verdict. If there was error in the verdict, the effect of this process was to get rid of it, or, according to the terms of the Scotch law, to reduce the retour of the service, that is, the verdict of the jury retoured or returned to Chancery.

" In 1617, by the 13th chapter of the Statutes of that year, the period of three years was maintained so far as regarded the proceedings against the jury ; but a different period was adopted for the purpose of questioning the title of the party himself who had been served heir, and twenty years were allowed for that purpose. By that Statute, therefore, the term of twenty years was given to a party, if he claimed as nearer heir to reduce the service and retour of another person who had served as heir. This Act was passed in terms new at that period ; it introduced the phrase ' reduction of retour ; ' and this is the Act under which the present process was instituted.

" In this case, then, the question is, Whether the pursuer (appellant) is not met by the provision of this Act ? The argument raised in support of the claim of the appellant was, that although the terms of the 13th chapter of the Act 1617, taken by themselves, were nearly free from ambiguity, still that the 12th chapter of the Statutes of the same year, passed upon a similar subject, was inconsistent with chapter 13, and that the same construction ought to be put upon the provisions of that Act as on the other, or according to some part of the argument adduced, that the provisions of the 13th chapter ought altogether to be disregarded. If, my Lords, it had been the case that there was any inconsistency in the two Statutes, according to the ordinary rules of construction of Statutes, the last enactment would of course have prevailed ; if the provisions of the 13th chapter were inconsistent with the provisions of the 12th, the 12th must have yielded to the 13th, rather

than the 13th to the 12th. But I do not find that there is this inconsistency in the provisions of the two Acts.

“ Chapter 13th provides for something distinct from that which has been provided for in chapter 12. In chapter 12 the words are, ‘ that they (that is the parties in possession) shew and produce instruments of seisin, one or more, continued and standing together for the space of forty years, either proceeding upon retours or upon precepts of *clare constat* ;’ which the Statute declares shall be a good title against all persons whatever. There must therefore, under this Statute, be not only a possession of forty years, but a possession with an ostensible ground of title; there must be that which would in this country be called an adverse possession, that is a possession hostile to the party claiming the right to the same, having its origin in a title hostile to the right of the party claiming ; and this will make a title against all the world. The provisions of the 13th chapter seem to me to be quite consistent with that title being good against all the world. By the 13th chapter it is only provided that the party served heir shall not be disturbed in his rights as heir after twenty years, by any action brought by another person claiming only to be heir. But the heir may be disturbed by any person who comes in with a stronger title than that of mere heirship. It is quite consistent that those two parties, as between themselves, may be precluded from disputing as to their title after twenty years have elapsed, and yet that another party should not by means of possession adversely acquire a title against all the world till the expiration of forty years. The Statute in chapter 13 only provides that *quoad* the heirship, the service and retour by one party *quà* heir shall not be disputed by another party who merely comes in *quà* heir. It is not putting a forced construction upon one or other of those Statutes to say, that they are consistent with each other, indeed it seems to me, that this is the obvious import of the words of the two Statutes taken together.

“ My Lords, in the present case we have a party who was retoured heir in 1809, and an act done by him upon that retour, viz., the ratification of a conveyance by his ancestor to a third party, and possession under his assent by the party to whom the deed of conveyance was made. Although the pre-

NEILSON  
P.  
COCHRANE'S  
REPRESENTA-  
TIVES.  
—  
1840.

NEILSON  
C.  
COCHRANE'S  
REPRESENTA-  
TIVES.  
1840.

sent pursuer may claim by title paramount, the question is, Whether under those circumstances he can, in the character of heir, come in and dispute a title of this nature ?

“ As to the consistency of the two chapters of the Statute, I do not think that any doubt whatever can exist. But it was said that this 13th chapter of the Act related only to a special service, and not to a general service. It was so said ; but it was proved to demonstration, that anterior to this period general service was in use. I think, therefore, that this Act must be taken to apply to the law as it existed in practice at the time of its enactment, and must be considered as extending to any proceedings by which a party might be served as heir.

“ The provisions of these Statutes of 1494 and 1617, chapter 13, have also had this objection made to them, that there have not been any decisions founded upon them. That is true, but there are various writers, who from time to time have published works upon the law of Scotland, who have spoken of this distinction between special and general service ; and there are some text writers who say that these Statutes apply to every species of service. Lord Bankton is one of those ; he says that they apply to general service.

“ I have not found any authority by which the claim of the appellant can be supported. But then it is said that in the Bargany case there were observations of the Judges which supported the appellant's view of the matter. These observations did not fairly arise from the subject-matter of adjudication ; the case itself proceeded upon a totally different ground. That there was nothing in the case to support the position alluded to was apparent from the answer to a question which I put to the counsel at the bar.

“ Then, my Lords, it was said that the Act of 1617, chapter 13, must be considered as applying only to the species of process which at that time existed, namely, to the prosecution of the jury for an erroneous conclusion. I do not find any ground in the Statute for that argument ; on the contrary, I find that the Statute expressly distinguishes and separately provides for both cases ; it gives the opportunity for twenty years of instituting proceedings for the purpose of reducing the retour, but it gives him three years only for the purpose of instituting this

proceeding against the Jury. With respect to that proposition, I have also carefully looked through the text writers that have been referred to, for the purpose of seeing whether in those text writers there was any thing to support it, and I can find no allusion to it.

NELSON  
v.  
COCHRANE'S  
REPRESENTA-  
TIVES.  
1840.

" Then it was said, that in order to entitle the party to this defence, he must have what was called possession, by which I understood the learned counsel to mean, not mere possession, but possession under a feudal title, that is to say, he must have made up titles under the service as heir. My Lords, there is not only nothing to support that, but there is the authority of Lord Bankton against it, who states that possession is not necessary.

" It is very true, that cases are referred to in the papers, and were suggested at the bar, in which it might be matter for serious consideration, how far a party should be entitled to make an unfair use of the Statute ; that is to say, where some unjust advantage by concealment or otherwise may have been taken of the true heir. My Lords, if that case should arise, it would be your Lordships' duty to put a reasonable and proper construction upon the Statute to meet the case presented ; but there is no circumstance in this case, and your Lordships are not therefore called upon to give any opinion upon the subject. (Here his Lordship stated particularly the facts of the case.)

" In the absence, therefore, of all authority against the prescription, looking to the plain terms of the Act which gives the prescription, and coupled with the circumstances of the case, and weighing the arguments and observations which have been made against it, I trust your Lordships will be of opinion, that (without going further in order to state any opinion as to other circumstances that may arise) the decision of the Court of Session is correct, and that your Lordships will, therefore, affirm this interlocutor, and affirm it with costs."

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II.—CAMPBELL v. CAMPBELL.

In 1706 Sir Colin Campbell entailed the lands of Strachur and Ardgattan on John Campbell in liferent, and his sons Colin, NARRATIVE.  
JAN. 26, 1848.

CAMPBELL  
v.  
CAMPBELL.  
1848.

Archibald, and John Campbell successively in fee, and the heirs-male, whom failing, the heirs-female, of their bodies. General Campbell, son of Colin Campbell, having succeeded his father, he made up titles to the lands of Strachur by precept from Chancery and sasine in 1744, and to the lands of Ardgattan by precept of *clare constat* and infeftment in 1751.

In 1797 General Campbell executed a disposition of the lands in favour of himself; whom failing, to the heirs of provision in the entail 1706; whom failing, to certain other persons; and that under the whole conditions of the original entail. On this disposition a Crown charter was expedite applicable to the lands of Strachur, on which General Campbell was infeft in 1798; but he made up no new title to the lands of Ardgattan.

In 1807 Mrs. Janet Campbell, sister of General Campbell, expedite a general service as nearest and lawful heir-female of tailzie under the disposition of 1797, and also a special service in the same character to the lands of Strachur, in which General Campbell had been infeft. She was thereafter infeft on the special retour in the lands of Strachur, and on the general service she obtained a charter of resignation of the lands of Ardgattan, proceeding on the unexecuted procuratory contained in the disposition of 1797; and on this charter she was also infeft.

Mrs. Campbell was succeeded by her grandson, Major Colin Campbell, who completed his title in 1821, and he was succeeded by his son John Campbell in 1825.

In 1846 the pursuer raised an action of reduction and declarator for the purpose of setting aside the disposition executed by General John Campbell in 1797, and the titles and retours following thereon. The character in which he claimed was as the nearest lawful heir-male of the body of John, third son of the first John Campbell of Strachur, and he founded on the deed of 1797, in so far as it was not in contravention of the original entail. The defender pleaded, that the disposition of 1797 having been in existence and unchallenged for more than forty years, it formed the standing investiture of the estate, and that the retours of Mrs. Janet Campbell his great-grandmother, Major Campbell his father, and himself, were all fortified by the vicennial prescription under the Act 1617, c. 13.



PLEADED FOR THE PURSUER.—The Act 1617, c. 13, applies only to services of heirs-at-law. The preamble of the Act recited, that the object of the legislature was to prevent the former Act 1494, c. 57, operating as a limitation of the rights of “the righteous heir and nearest of kin, who by the law of God and man was to succeed in the right of blood and succession of their predecessors, and to their lands and heritages *jure sanguinis* ;” the enacting words of the Act, therefore, applied only to retours in which the claimant had been served, as heir-at-law, *jure sanguinis* ; and did not operate against a party who was entitled to succeed by virtue of the destination in a deed. The intention of the legislature was to prevent challenges of a service after a lapse of twenty years, when the witnesses by whose evidence the propinquity of the party retoured had been proved, might probably be dead, or otherwise beyond his reach. An heir of entail had, moreover, a *jus crediti* constituted in his favour by the deed of entail ; and even were it to be held that the operation of the vicennial prescription was sufficient to defeat the rights of a mere heir of provision, it could not extinguish the rights of an heir of entail, which were to be regarded as founded on obligation, and therefore could be extinguished only by the operation of the positive prescription under the Act 1617, c. 12.

CAMPBELL  
v.  
CAMPBELL.  
1848.  
ARGUMENT FOR  
PURSUER.

PLEADED FOR THE DEFENDER.—The Act 1617, c. 17, applied to all retours, whether of heirs-at-law or of heirs of provision ; and its clear import was simply to make twenty, and not three, years the period of prescription. Further, it was impossible, in such a case as this, to inquire who was the heir of provision under the deed, without also inquiring into the *jus sanguinis* ; the whole question, in fact, resolved itself into a question of propinquity.

ARGUMENT FOR  
DEFENDER.

LORD ROBERTSON, Ordinary, Found, “That the present action of reduction, which was not instituted until the 3d August 1846, has been raised for the purpose of setting aside the foresaid disposition by the said General John Campbell, dated 15th April 1797, and subsequent titles and retours following thereon ; and that the title on which the pursuer founds is that of nearest

CAMPBELL  
v.  
CAMPBELL.  

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1848.

and lawful heir-male to John Campbell, third lawful son of John Campbell of Strachur, the person first named in the said deed of entail of 24th April 1706, and also nearest and lawful heir-male of tailzie of the said General John Campbell, under the said entail of 1706, and the said disposition of 15th April 1797, in so far as the same may be valid and effectual, and not in contravention of the former deed of entail : finds, in so far as regards the foresaid lands of Strachur, the titles made up in the person of the said General John Campbell, under the foresaid Crown charter, dated 5th July, and sealed 8th November 1797, and instrument of sasine, dated 5th, registered 21st February 1798, form the standing investiture, and that the same is fortified by prescription under the Act 1617, c. 12, and that no challenge thereof is competent in respect of any prior titles, and that no relevant ground has been set forth for challenging the same : finds, that, in so far as regards the said lands of Strachur and others, the retour of the special service of the said Mrs. Janet Campbell, dated 30th March 1807, the retour of the special service of the said Major Colin Campbell, dated 21st November 1821, and the retour of the special service of the defender, dated 12th January 1825, not having been challenged in any action of reduction, intended, executed, and pursued, within the space of twenty years immediately following the date of the said retours and services, the same are prescribed under the Act 1617, c. 13, and that no party can now be heard to set aside the same in any action of reduction, in so far as regards the said lands."

JUDGMENT.  
Jan. 26, 1848.

The pursuer having reclaimed, the Court " Adhered."

OPINIONS.

LORD PRESIDENT BOYLE.—" I have paid all attention to the ingenious argument of the pursuer, but I can see neither reason nor authority for altering the interlocutor."

LORD MACKENZIE concurred.

LORD FULLERTON.—" In this case there is no room for the distinction maintained by the pursuer. There is nothing here but a question of propinquity ; there is no question whatever, either of law or destination. Mrs. Campbell was undoubtedly the heir, both in the original entail and in the deed of 1797, if

there were no heirs-male in existence. Whether she was the nearest heir was a question of fact or propinquity, and this is just the same point as that raised in the case of Cochrane. Suppose the destination in this entail had been in favour of heirs-male alone, and that a party had been served heir under the destination, could the operation of the Statute 1617, c. 13, be excluded by another party coming forward and saying, I am a nearer heir than the party previously served? Certainly not; and I cannot see the difference between such a case and the present. I therefore think the interlocutor is right."

CAMPBELL  
v.  
CAMPBELL.  
1848.

LORD JEFFREY.—"It is impossible to take any other view. I have always thought the Act 1617, c. 13, a fertile source of perplexity, and its clashing with the great Act of the same year, which introduced the prescription of forty years, has added to our difficulties. I perfectly recollect arguing the case of Bargany, and that every one thought it a great relief when we found a flaw on the face of the retour, which saved the Court from the necessity of 'redding the marches' between these Statutes. Looking at the words of this Act, and at the authorities, I confess I cannot concur in the opinion of that eminent lawyer, Sir George Mackenzie, that heirs *jure sanguinis* are excluded from the benefit of this prescription; nor, on the other hand, can I hold that they alone can avail themselves of its provisions. It has been argued, indeed, that mere heirs of provision, who are not heirs *jure sanguinis*, cannot plead this prescription; but for that doctrine I can find no authority. But, *de facto*, the only question is the question of propinquity. Had this claimant appeared as a competitor with Mrs. Campbell in 1807, the only question would have been, was he an heir-male called in the entail? If he had established for himself that character, beyond doubt he would have been preferred to her."

In the Bargany cause, FULLERTON v. HAMILTON, affirmed in House of Lords, June 20, 1825, the plea of vicennial prescription was not sustained, because it ap-

peared on the face of the retour itself, that the party served was not the heir of the person who died last vested in the lands. In this case the party not the next

heir was served, in consequence of the nearer heir having repudiated the estate, the investiture preventing him from holding it along with another; but he reserved his right, and that of his descendants, to take the succession of the estate, in the event of him or his descendants being able to take the succession consistently with the investiture. In the opinion returned in that case by LORD PRESIDENT HOPE, LORDS HERMAND, SUCCOTH, BALGRAY, GILLIES, ALLOWAY, CRINGLETIE, MEADOWBANK, MACKENZIE, and ELDIN, they observed,—"We are very clearly of opinion that no difficulty arises from the retour of John Hamilton, as being fortified by the vicennial prescription under the Act 1617. We are of opinion that the vicennial prescription could not run upon that retour, because it appears, upon the face of the retour itself, that the party who was served heir was not, and could not be, the heir of the person who died last vested in the right. John Hamilton was only the second son of Joanna Hamilton, whereas the right to the estate descended to his eldest brother, Sir Hew, by the terms of the Bargany entail. All this appears from the retour itself, which was therefore a mere nullity. We think that no prescription could run upon such a retour, as it is a general rule of law, that prescription does not cover defects that appear upon the face of the writing upon which prescription is pleaded; and as it appears upon the face of the retour that John was not heir, it proves

that fact, but cannot prove the contrary fact, that he was the heir of James Lord Bargany, the person last in the right. The retour refers to the judgment of the House of Lords affirming the judgment of the Court of Session, 'per quam compertum fuit quod status de Bargany descendit ad Dominum Hugonem Dalrymple de Castleton filium natu maximum,' &c., 'et quod ille debet inserviri hæres talliæ,' &c. The retour then refers to the deed of repudiation, as 'quoddam scriptum,' &c., 'per quod repudiavit,' &c., 'in favorem dict. Joannis Hamilton proximi hæredis talliæ,' &c. We are of opinion, that the retour of John Hamilton could not have protected himself against a reduction, or other challenge of it; but we are farther of opinion, that a retour, though correct and unexceptionable *ex facie*, and therefore sufficient to protect the person served as heir, after the vicennial prescription, is only of a personal nature; and though it may protect himself personally, cannot after his death affect the right of the true heir, for such was not the meaning of the Statute. And it is worthy of remark, that if the vicennial prescription had been available to the heirs of the prescriber, so as to exclude the true heirs of the investiture, the forty years' prescription of land-rights would by necessary consequence have been done away, and in every case of titles made up by service and retour a shorter prescription of twenty years would have been established; while, in the case of

titles made up by precept of *clare constat*, adjudication in implement, or any other mode, the full prescription of forty years would have been required. It is evident that a vicennial prescription of sasines, proceeding upon retours, is utterly inconsistent with the Act establishing the forty years' prescription in its very terms, by which it is provided, that where there is no charter extant, the

party must shew and produce instruments of sasine, one or more, standing together for the said space of forty years, either proceeding upon retours, or upon precepts of *clare constat*. We think, therefore, that it would be a total misconstruction of these two Acts, as they must be taken together, to hold that the vicennial prescription is of the smallest consequence in this case."

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## FEE AND LIFERENT.

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*A Conveyance to a Parent in Liferent, and to his children unborn or unnamed in fee, imports a right of fee in the parent, and a spes successionis merely in the children.*

### I.—FROG'S CREDITORS *v.* HIS CHILDREN.

Nov. 25, 1735.

**NARRATIVE**

BETHEA DUNDAS conveyed certain heritable subjects to her eldest grandson Robert Frog “in liferent, and to the heirs lawfully to be procreated of his body in fee ; and failing of him by decease, without heirs of his body, to his brother James Frog, also in liferent, and to the heirs lawfully to be procreated of his body in fee ; and failing both her said grandsons without heirs of their bodies, to John Frog, her second son, in liferent, and the heirs of his body in fee ; which failing, to Elizabeth Frog, her daughter, in liferent, and the heirs of her body in fee ; which all failing, to her own nearest lawful heirs whatsoever.”

In virtue of this deed Robert Frog was infest, and having afterwards contracted debt, he, in order to make payment to his creditors, sold the subjects contained in the disposition. The purchaser, however, having objected to complete the sale, on the ground that the seller had only a liferent in the subjects, the case was brought into Court for the purpose of having that point determined, the contradictors being the creditors of the seller on the one hand, and his children on the other.

PLEADED FOR THE CREDITORS.—The question in dispute is, Whether the fee in the subjects conveyed by Bethea Dundas was, by the disposition executed by her, conveyed to Robert Frog, or to the heirs of his body, none of whom were existing at the time?

FROG'S  
CREDITORS  
v.  
HIS CHILDREN.  
1785.  
ARGUMENT FOR  
THE CREDITORS.

Wherever a right is granted to a father in liferent, and to the heirs of his body *nascituri* in fee, the father is always understood to be fiar, if no other restriction is expressed, and his children are deemed only heirs of provision. It is a settled principle of law, that a fee cannot be *in pendente*, but must be settled upon some person existing at the time of the disposition. The reason of this maxim is, that it would be inconsistent with common sense to suppose a property without a proprietor; and if the contrary doctrine took place, many absurdities would follow. Thus, if the *dominium directum* were allowed to be pendent, the vassal could not be entered; and if the *dominium utile*, the superior could not have a vassal. If, again, the former proprietor had contracted debt, his creditors could not affect it, because there would be no person from whom it could be adjudged. Accordingly, Lord Stair declares, "that the fee necessarily must belong to some person, and it cannot hang in the heir on a future possibility, which is a principle mentioned, and use hath been made frequently before." As, therefore, this maxim has been considered as a fixed principle in law, it has followed that parents taking rights to themselves or others, settling them upon them with substitutions to their children *nascituri*, have promiscuously made use of the words "fee, conjunct fee, or liferent," because all these words, when applied to the parents, behaved to have the same effect. As children *nascituri* could not possibly be vested in the fee when they were not in being, the liferent provided to the parent is understood to be a *usus fructus causalis*, resolving into a real fee, the children being capable of no other right but a succession to the fee after the father's decease; and therefore, though they were nominally designed fiars, that, from the nature of the thing, could impart no more than a provision of succession. If, in the present case, the disponent had intended to have given the parent a bare liferent merely, she would have added the word "allenary." That word not being used,

FROG'S  
CREDITORS  
v.  
HIS CHILDREN.  
1785.

the term liferent imparts a *usus fructus causalis*. The idea of a fiduciary fee being in the father for behoof of the heirs of his body, is an imagination which has no foundation in the settlement, and directly contradicts the argument on behalf of the children, which depends upon taking the word liferent in a strict and limited sense. If that is departed from, and it is once admitted that the fee is by the deed lodged in the father, it is necessary to shew what words there are in the deed which import a restriction upon him. A trust is not to be inferred from such a clause as that in question. Trusts must be plainly expressed, and not left to be gathered from remote inferences.

ARGUMENT FOR  
THE CHILDREN.

PLEADED FOR THE CHILDREN.—The words of a conveyance cannot be interpreted in opposition to their legal and natural import. A disposition granted to a person in liferent cannot be construed to mean a disposition in fee. The words used, and the thing signified, are, in law and sense, and in common use, entirely different in their import. It is admitted by the creditors, that had the disposition been to Robert Frog allennarly, they could not then have pretended that he was fiar; and yet there is not one single argument drawn from the pendency of the fee, in the present case, which would not have applied with equal strength to the case supposed. Therefore it is evident, that either the principle is false or misapplied.

The maxim that a fee cannot be *in pendente*, is, like most other rules in law, subject to exceptions. The case of an *hereditas jacens* is one instance that a fee may be pendent. But granting that it were a rule that a fee cannot be pendent, yet that does not affect the present question, which is, Whether a disposition to a person in liferent is to be construed a disposition in fee, contrary to the plain and obvious meaning of the words, which import rights of a quite different nature? What is more common in law than dispositions and legacies under a great many conditions, such as *Si navis ex Asia venerit, si Capitolium ascenderit*. During the pendency of such a condition, who is fiar? The answer is, the disponent himself, or his heir is fiduciary fiar; but then, upon the existence of the condition, he to whom the disposition or condition was made takes



up the subject, and had by the civil law a *rei vindicatio* competent to him against all possessors.

If the subject in question had been conveyed to the heirs to be procreated of Robert Frog's body, without any provision at all to Robert Frog, what would have been the effect of the disposition? Would it have vested the estate in persons not existing? or would it have made the estate caduciary? It is plain that such a disposition, though here resolved into a condition, namely, if Robert Frog had children. During the pendency of that condition, if it be denied that the fee was pendent, then it is clear that it remained with the disponer during her life, and afterwards with her heirs-at-law fiduciary, for the behoof of the children when they should exist, and if they never did exist, then it remained with the heirs of the disponer; nor does any difference arise from the circumstance of the liferent being disposed to Robert Frog for *tantum concessum quantum scriptum*. The liferent is a distinct and separate right from the fee. The liferent might have been conveyed to one, and the fee to the heirs of another. In this case surely he to whom the liferent was provided could claim no more but the liferent, even although those to whom the fee was provided were only *nascituri*.

What seems to mislead the creditors of Robert Frog is, the conveyance being to his heirs, which sounds as if they were to derive right through him. This, however, is a mistake. For they are by no means heirs to him in the subject disposed, but direct disponees themselves, and have no necessity for a service to any body to entitle them to the subject, but require only a proof or cognition that they are the children of Robert Frog. The calling them the heirs of the body of Robert Frog is only to point out who was to succeed, but does not constitute their title of succession. The father, therefore, being provided in the liferent, cannot prejudge the children's fee, no more than if a stranger had been provided in it; and he can reap no more benefit by the provision of fee being to his own children *nascituri*, than if it had been to the children *nascituri* of another, unless the creditors can establish a new sort of succession, and maintain, that because a man's children succeed to him after he is dead, therefore he should succeed to them before they are born.

Frog's  
CREDITORS  
v.  
His CHILDREN.  
1735.

FROG'S  
CREDITORS  
v.  
HIS CHILDREN.  
1785.  
First Interlocu-  
tor of Court.  
Jan. 28, 1784.

"The Lords having considered the right granted by Bethea Dundas to Robert Frog, her grandson, Find, that thereby a right of liferent was only established in the person of the said Robert, and therefore that the creditors of the said Robert have no interest in the price."

JUDGMENT.  
Nov. 25, 1785.

The creditors having reclaimed, the Court Altered their former interlocutor, and "Found Robert Frog to be fiar."

1. On the Session Papers LORD KILKERRAN has written, "The Lords altered—ELCHIES, because of a special clause in the disposition, which supposed Robert and James might have had the fee devolved on them. NEWHALL, for a more general reason, namely, because of the many decisions. *Nota.*—This is one of those cases in which little matter how the law be, provided it be fixed, and therefore the decision should not be altered, whatever one might think were the practice to begin."—*MS. Notes, Kilkerran's Session Papers.* In the case of LILLY v. LIDDLE, February 24, 1741, a similar judgment was pronounced. In his Decisions Lord Kilkerran observes,—“This point was formerly so determined in the case of the children of Robert Frog v. His Creditors, and only because the Court had given different judgments upon it in that case is the present case taken notice of, in which it was so much considered as an established point, that a bill reclaiming against the Ordinary's interlocutor was refused

without answers, many of the Court at the same time declaring, as likewise had been done in the said case of Frog, that but for the course of decisions, they should have been of opinion that the son was not fiar but fiduciary for his children.”—*Kilkerran's Decisions*, p. 190.

2. In the case of LINDSAY v. DOTT, December 9, 1807, a father conveyed to himself, in liferent, and to his daughter, *nominatim*, “also in liferent, during all the days of her lifetime, and to the children already procreated, or to be procreated of the marriage between her and David Lindsay, equally amongst them, in fee.” The father reserved to himself power to alter, sell, burden, or dispone, as fully and effectually as if his daughter's name had not been mentioned. On her father's death the daughter took possession of the subjects, and thereafter sold them. On her death her children brought an action of declarator and reduction to establish their right to the subjects, and to set aside that of the pur-

chaser. Two specialties were founded upon by the pursuer, as distinguishing the case from that of Newlands. One was, that their mother was only an interjected party between the original party and the ultimate fiar. The other specialty was, that the children of the daughter were not *nascituri*,

but were all born before the deed was executed. It was therefore argued upon this last specialty, that there was no legal difficulty in vesting the fee in the children. The Court "Repelled the reasons of reduction, and assoilzied the defender."

## II.—DEWAR v. M'KINNON.

In 1780 Elizabeth Campbell, by her marriage-contract with Mr. M'Kinnon, in the event of her succeeding to the lands of Ormaig and Blairintibbert, conveyed these lands, under the reservation of her own and her husband's liferent thereof, "to and in favour of the heir-male of this marriage; whom failing, to the heir-female thereof."

May 5, 1825.

NARRATIVE.

In the contract it was provided, that if Miss Campbell should happen to marry a second time, and there should be a child or children of the first marriage then existing, the liferent provisions reserved to her, "whether proceeding from the rents of the said lands or otherwise, should be restricted after her second marriage to the sum of £30 sterling yearly, and the remainder should pertain and belong to the children of this marriage."

Her husband, Mr. M'Kinnon, died, leaving two sons of the marriage. Mrs. M'Kinnon thereafter succeeded to the said estates, and, as fiar of the estates, granted heritable bonds over them. One of the creditors having proceeded to attach the estate by adjudication, her eldest son claimed them as being the fiar in them under his mother's contract of marriage.

To try this question the eldest son brought an action of adjudication in implement against his mother, in which he set forth that she "was bound to have executed all deeds necessary for properly and feudally vesting the said lands and estate, under the said reservations and other burdens and conditions, in his favour, and particularly to have made, granted, sub-

DEWAR  
v.  
M'KINNON.  
1825.

scribed, and delivered, a valid and sufficient disposition of the said lands and estate of Ormaig and Blairintibbert and others, to and in favour of the pursuer as heir-male of the said marriage, whom failing, to the heir-female thereof, under the reservation and other burdens and declarations and conditions before-mentioned, &c., and to deliver therewith the title-deeds in her possession, in order that the heritable and irredeemable right of the said lands, burdened as aforesaid, may be properly vested in the person of the said pursuer, as heir foresaid, according to the true intent and meaning of the said contract of marriage, and obligation therein contained." He then concluded for adjudication, under reservation of her liferent.

In the course of the action the pursuer died, and his trustees were sisted in his place.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—As the pursuer is the heir-male of the marriage, the defender is bound to implement her obligation in her marriage-contract, by disponing to him the lands in question, under reservation of her own liferent. From the whole terms of the contract, and more especially from the clause restricting her liferent in the estates to £30 in case of entering into a second marriage, it is plain that it was the meaning and intention of the parties that she should only have a liferent. The present question, too, is one not with creditors, but with the heir, as to what is the meaning of a contract of marriage or family arrangement. Effect, therefore, should be given to what appears to be the intention of the parties, and that intention ought not to be superseded by a strict technical interpretation of the words employed.

ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—It has been established by a series of decisions, that where an estate is disposed to a parent in liferent, and to children *nascituri* in fee, without any restrictive words, the fee belongs to the parent. Applying this rule to the words of the dispositive clause in the contract of marriage, it is clear that the fee was vested in the defender, and not in the heir-male to be procreated of the marriage. If such is the true construction of the dispositive clause, it is not competent to control it by expressions in other parts of the deed.

LORD PITMILLY, Ordinary, " Found, that the fee of the lands in question is vested in the defender."

DEWAR  
v.  
M'KINNON.

1825.

JUDGMENT.  
Feb. 5, 1821.

The pursuer having reclaimed, the Court " Adhered."

The pursuer appealed to the House of Lords.

In the course of the reply for the Appellant, LORD CHANCELLOR ELDON observed,—“ I understand that you mean to contend, that the deed is to be read as if the word ‘ allenarly’ had been in it. You mean also to contend, that there are other restrictive words equivalent to allenarly. It has been stated that that is a new point, not argued before the Court of Session. You state, that there is another new point made on the other side of the Bar, namely, that if the word ‘ allenarly’ had been in this contract, the titles must have been made up in the way they were at the time the inheritance came to her under this contract. Now that also is said to be a new point not before the Court of Session. Then there arises the question, Whether we are to deal with both of these in point of form without remitting the cause ? If the word ‘ allenarly’ had been there, you would have contended in this way,—that if, previous to the estate becoming hers, there were children born, the doctrine that arises where there is the term *nascituri*, will not apply, for the fee would not in that case have been pendent, for the inheritance must be vested in her children ; and that if the children were *nascituri*, the parent ought to be made fiduciary for the children,—a doctrine as to which Lord Rosslyn said, (being rather more of a North countryman than I am,) that he did not understand what it meant. I should be disposed, without much farther consideration, to send this back to the Court of Session, desiring them to consider the point, but that remits seem very unpopular just now. I would not, therefore, wish to do it if I could help it.”

THE SOLICITOR-GENERAL having proceeded in his reply,—

THE LORD CHANCELLOR again observed, “ I think what Lord Rosslyn meant was, that the Court of Session had so frequently decided, that where the word ‘ only’ was not in the settlement, the fee should be considered as being in the parent, that he

DEWAR  
v.  
M'KINNON.  
1825.

would not determine that the word 'only' should make any distinction, but that he could not understand how the parent would be a fiduciary. Whether that is understood in Scotland I cannot say."

THE SOLICITOR-GENERAL having again proceeded,—

THE LORD CHANCELLOR observed, "According to the English law, the son would not be bound to pay one farthing; for his obligation would arise only out of his taking this estate by virtue of this instrument. According to the English law, I take it to be as clear as the sun at noon-day, that no child of this marriage would have been bound, by this contract, to pay the £200, unless he took under this contract. Then how is that clause to operate in the case mentioned, that of the wife's estate being restrained to £30 a-year?"

OPINIONS.

At the close of the argument THE LORD CHANCELLOR observed,—“My Lords, the Solicitor-General of England has expressed a doubt, whether his mind is not in the situation of being a good deal influenced by his notions of the law of England. I would fairly say, that I am conscious that may be equally the case with my mind; and I hope that may afford an excuse, not unreasonable, for my desiring of your Lordships some time to consider of this important case. I cannot help representing that my mind may be in some danger of being misled by the doctrines of the law of England, taking care, as I would at the same time, to state, that there is no principle which I have held more sacred, ever since I have had the honour of assisting your Lordships in judicial matters respecting the law of Scotland, than to recollect, and to act upon that recollection, that we are sitting here as the Court of Session in Scotland, to decide as that Court ought to decide, and that we are bound not to apply our English principles, and our English doctrines, in judicial decisions upon the law of Scotland.

“My Lords,—Perhaps this is a case which has a stronger tendency to mislead an English lawyer than most cases have, because the distinction in our law with respect to immediate conveyances, and contracts for conveyances, is so well settled, that a man's mind is apt to dwell, perhaps too readily, on matters that are extremely well settled. Your Lordships know

that, in conformity to what is here stated to be the law of Scotland, if an immediate conveyance is made of lands to A for life, with remainder to the heirs of his body, or remainder to his right heirs, though that estate is given him only for life, yet, on settled principles, he has the fee in him, by virtue of the estate tail, with remainder to the heirs of his body, with the remainder in fee to himself. This doctrine is carried so far that, even in wills where it appears to be the general intention of the testator that the person shall not take an estate merely for his life, still, although it is expressly given him for life, you sacrifice the particular intention to the general intention of the testator, and you give him an estate tail. A more remarkable case cannot be stated than the case *Robinson v. Robinson*, in which an estate was given to a man for life, and no longer, and yet he was held to have an estate of inheritance on account of the general intention of the testator.

DEWAR  
v.  
M'KINNON.  
1825.

“ With respect to a marriage-contract, there can be no manner of doubt that, according to what is held to be the effect of a marriage-contract, an agreement to convey an estate in future, we should take great care so to limit the estate, that the children should not have merely a *spes successionis*, but that they should have a secure estate of inheritance vested in them, though, if the same words had been used in an ordinary disposition, those children would have taken no estate, unless they took by inheritance from their parent.

“ Now, there is one principle in the law of Scotland which is common to the law of England, and I take it to be this :—In the *first* place, If you find points settled, particularly points of title, you must take infinite care not to disturb them on slight reasons of distinction ; and that although the mind of the individual who is to discharge the duties of a Judge may possibly suggest, and without his being able to get rid of the effect of that suggestion, that the actual intention of the party was different from that which is the implied intention of certain words that have been long settled to have a definite meaning, you must dismiss the reasoning that the individual applies upon the subject, and take yourselves to, and give the parties the benefit of, that implied intention which has been considered to be the meaning of the words, that have frequently, and during

DEWAR  
P.  
M'KINNON.  
1826.

a long period, received judicial interpretation, though that judicial interpretation may be contrary to that which ought originally to have been put upon these words.

“ My Lords,—There is another reason why I feel particularly anxious to have a little time to consider this case, and I will fairly avow that it arises, not perhaps from circumstances connected only with this case, but from circumstances connected with your general administration of justice in Scotch causes. My Lords, there is a great degree of inconvenience, I am ready to admit, in frequently remitting causes for farther consideration to the Court of Session. It is impossible to deny that it leads to a great deal of delay, and a great deal of expense. On the other hand, it must never be forgotten, as it appears to me that your Lordships, forming a court of judicature, run very great risk, if the points are first discussed at your Bar, and first decided upon there, whether you are right or wrong, because you are a Court of Appeal, and the great doctrines of the law of Scotland ought to be originally discussed, and decided in Scotland; and, having been overlooked in the Court below, you run the risk of making the decision, which you must do as the Court of Session, in a way which the Court of Session itself, if the matter had been discussed before it, would not willingly have acceded to, as stating properly the doctrines of their law.

“ My Lords,—I remember perfectly well what it was that led to the remittances, at a particular period, when there were a great number of them; it originated in a conversation held between my Lord Thurlow and my Lord Rosslyn, in this House, soon after I had the honour first of sitting upon your Lordships' woolsack: the particulars of that conversation it may not be necessary or fit for me to state now, but I shall very readily communicate the substance of it to any of my friends, the lieges of Scotland, who are at your Lordships' Bar, who may wish to know what the nature of that conversation was.

“ Now, there are some important points in this case which have been discussed, and, as far as one collects from the papers, have been discussed for the first time; and it will remain for consideration, whether it will become necessary to consider of them in disposing of this cause, and in what way this House



ought to dispose of it. My Lords, in respect to the doctrine itself, I should take it to be clearly established, (and whether right or wrong it is not of much consequence to inquire, when the point is clearly established), that if there is a limitation in a conveyance of an interest *in presenti*, and unconnected with any question of contract, to a man and his wife, and the children of the marriage, on feudal principles, the fee is in the parents—one of the parents is the *fiar*—which of the parents depends upon the circumstances; and it is impossible, in my view of the case, to read what fell from my Lord Rosslyn in the case of Newlands, without seeing that it was his notion, that after that doctrine was once clearly established, it would have been infinitely better to have adhered to that doctrine, than to deny the application of that doctrine because the word ‘*allenary*’ was used. That appears to me to have been his meaning; but his Lordship would not venture upon those doubts about the impropriety of introducing that distinction to disturb that which had been settled, because the distinction had been adopted in the law of Scotland, because, in the administration of the law of Scotland, settlements had been construed by applying that distinction; and so it was held.

“ Then comes another question, which, undoubtedly, is a question of great importance, whether, if the word *allenary* makes a distinction, there are other words, or other provisions in this instrument, that shall be of the same effect as the word *allenary*? I am ready to go this length, namely, to say, that as this House was advised, by my Lord Rosslyn, that the effect that was originally attributed to the word *allenary* ought, in his judgment, still to be attributed to it, so it ought to have that effect; at the same time, I apprehend your Lordships will take great care not to extend the effect of that word farther, unless you are convinced that you ought to extend it farther.

“ My Lords,—I have not the slightest hesitation in saying, that if this was an English contract of marriage, I could not bring my mind to say that there ought to be an original limitation to the children; but it is quite a different question what ought to be the principle applied to it, taking it to be a Scotch instrument. It must be admitted there are clauses in this instrument, particularly with respect to the personal estate,

DEWAR  
v.  
MCKINNON.  
1825.

DEWAR  
v.  
M'KINNON.  
1825.

which would appear to me, even according to the law of Scotland, to go a long way to bring this case, if it related to the personal estate, within the authority of the case of Seton; for nothing is more clear than that there is an agreement, that whenever a sum of money shall be uplifted or recovered, security shall be taken for that in the names of trustees, as I understand it, for the father and mother and children. The doctrine in the case of Seton was this, that because trustees were to have the property, therefore the fee could not be *in pendente*, but that it was in the person who was trustee, and therefore the general doctrine should not apply; and I agree so far with my Lord Rosslyn, that unless you are to consider the parent in those cases in which you hold him a fiduciary to be a trustee, it is very difficult to say how you get the case out of the general rule, that the fee is not to be considered *in pendente*.

“ But then there is another way of looking at the case, which is this :—Supposing that would be the true way of considering the matter as to the personal property, would the intimation that such is to be the application of the personal property be sufficient to authorize you to say, that, with respect to this estate of Ormaig, a similar decision should be made? And that brings it back to the question, whether intimations of intention, scattered throughout the contract, are to have the same effect as the words in the cases alluded to have been determined to have, namely, to give the children an estate distinct from their parents? My Lords, it is an extremely difficult thing for an English lawyer to find out, in any event, if the heir-male of the marriage or the heir-female of the marriage did not take under this contract, how the heir-male of the marriage or the heir-female of the marriage would be bound to pay one shilling of that £200. But then we must not apply a difficulty which applies to English cases, and insist, that because that difficulty arises in English cases it will in Scotch, though the mind of the English lawyer cannot possibly find out how the estate of the wife, in the case mentioned, was to be restricted to £30 a year, if the wife was to take the inheritance under this contract. That is a puzzle in the mind of an English lawyer, and perhaps the mind of an English lawyer is apt to be puzzled. How far our doctrines

are to be reconciled with this case is, I think, that which we ought to dismiss from our minds entirely ; for the case must be decided according to what is the settled doctrine of the law of Scotland. And what is the settled doctrine of the law of Scotland we must endeavour to find out by what has been decided in the Courts of Scotland, regard being had also to that which has been decided in matters of the same nature in this House. For me, my Lords, I am only doing justice to myself when I say, that I never have intentionally approached to a conduct so grossly wrong as to intimate to your Lordships that you ought to apply English rules in the decision of such causes ; and I hope and trust, that to the last moment to which I shall have the honour of advising your Lordships, I shall do my utmost to put you in mind that it is your positive duty to apply the law of Scotland to all Scotch causes, and to act here as you would do on the application of the legal doctrines if you were sitting in the Court of Session in Scotland. Having made these few observations, I will humbly propose to your Lordships to allow a week or ten days for the examination of cases bearing upon this point, before your Lordships are moved to come to a decision."

DEWAR  
v.  
M'KINNON.  
1825.

It was thereafter " Ordered and Adjudged that the appeal be dismissed, and the interlocutors complained of affirmed."

JUDGMENT.  
House of Lords,  
May 5, 1825.

LORD CHANCELLOR ELDON.—" There is a cause which was heard before your Lordships several weeks ago, in which a gentleman of the name of Dewar, and others, are appellants, and a Mrs. Campbell or M'Kinnon, and others, are respondents. It arises from an action of adjudication in implement, brought before the Court of Session in Scotland for the purpose of trying the legal question, whether Mrs. Campbell can be restricted to a mere liferent of the property in dispute, or whether she is entitled to the fee of the property ? In defence, Mrs. Campbell founded upon her marriage-contract with Mr. M'Kinnon in 1780, as vesting her with the absolute fee of the estate. She also propounded three other defences, to which I shall not now call the attention of your Lordships. This question having come on to be argued before my Lord Pitmilley, as Lord Ordinary, that learned Judge, upon the 8th of December 1818, pro-

OPINIONS.

DEWAR  
v.  
M'KINNON.  
1825.

nounced an interlocutor, finding that the fee of the lands in question is vested in the present respondent, Mrs. Elizabeth Campbell; and his Lordship adhered to the interlocutor, upon considering a representation and answers for the parties. The cause was then brought under the review of the Court of Session, in the Second Division, by a reclaiming petition on the part of the appellants, when the Court refused that petition, and adhered to the interlocutor of my Lord Pitmilley; as they also did upon a second petition from the same parties. There was yet another interlocutor of the Court afterwards pronounced; but as it relates solely to the costs of the suit, I shall say nothing farther upon it at present. The result of these proceedings is, that here we have an appeal from two interlocutors of my Lord Pitmilley, and from two interlocutors of the Court of Session in the Second Division, upon a dry technical point of Scotch law, which is very ably stated in the papers upon your Lordships' table, and was argued with the very greatest ability at the Bar of this House.

"It seems to be universally held as the law of Scotland, that where a land estate is settled upon a parent in liferent, and upon his children *nascituri* in fee, the fee must of necessity be in the former; a necessity said to arise from this notion or from this principle, that a fee cannot be *in pendent*, although it appears to be admitted that, if the right of liferent be qualified by the term 'allenary,' or 'only,' the parents' right would be reduced to that of a liferent or fiduciary fee. The question, therefore, comes to this, whether, in Mrs. Campbell's marriage settlement, the context is such as to bring the present case under the same rule? And, I confess, when I find so many consecutive judgments of these learned persons in the Court below, and so powerful conviction expressed by them, that an adherence to this doctrine is necessary for the support of land-rights in Scotland, your Lordships certainly ought to pause before you give any countenance to an opposite principle.

"My Lords,—Since the hearing of this case, I have applied myself with most anxious attention to an examination of all the authorities which have been brought forward upon the present occasion; and although I do find cases (not easy to be distinguished from the present) where the right had been

restricted to a bare liferent, yet, in a question involving the security of Land rights in Scotland, and on which the whole profession of the law in that kingdom appear to feel so strongly, that an adherence to received and established opinions is of such importance to the security of family settlements, and to the peace and quiet of individuals, I dare not say to your Lordships that the interlocutors complained of are not well founded ; but, while I move that they be affirmed, I feel myself constrained to add, that, under all the circumstances, the appellants were perfectly justified in bringing the matter before this House, and that there is no ground whatever for subjecting them in the costs of the appeal."

DEWAR  
v.  
M'KINNON.  
1825.

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III.—GORDON v. M'INTOSH.

In 1825 Alexander Duke of Gordon, in contemplation of the marriage of his natural daughter Jane, executed a bond of provision in the following terms :—" I, Alexander Duke of Gordon, in contemplation of an intended marriage between Jane Gordon, my daughter, and Lachlan M'Intosh, surgeon, lately in Edinburgh, and for the love, favour, and affection which I have and bear to the said Jane Gordon, do by these presents bind and oblige myself, my heirs, executors, and successors whomsoever, to make payment to the said Jane Gordon, at the first term of Whitsunday or Martinmas after the said intended marriage, of the sum of £5000 sterling, and that to the said Jane Gordon in liferent, during all the days of her lifetime, secluding the *jus mariti* of the said Lachlan M'Intosh, her intended husband, and to the children to be procreated of the said intended marriage in fee, and that in such proportions as the said Jane Gordon and Lachlan M'Intosh shall appoint by any writing under their hands, and failing thereof, to the said children equally among them, share and share alike, or failing issue of the said intended marriage, then to the said Lachlan M'Intosh in fee. And further, I do by these presents bind and oblige myself, and my foresaids, to make payment to the said Jane Gordon during all the days of her lifetime, secluding the *jus mariti* of the said Lachlan M'Intosh, of a free liferent annuity of £200 sterling

April 17, 1845.

NARRATIVE.

GORDON  
P.  
M'INTOSH.  
1845.

per annum, payable half-yearly, commencing at the first term of Whitsunday or Martinmas which shall happen one year after the date of the said intended marriage, and so forth thereafter, half-yearly, at each term of Whitsunday and Martinmas, during the lifetime of the said Jane Gordon, with a fifth part more of the said annuity of liquidate penalty for each term's failure in payment thereof, declaring that the said annuity, and also the interest on the foresaid sum of £5000 sterling, shall be payable upon the receipt of the said Jane Gordon alone during her lifetime, and declaring also, that in case I, the said Duke, or my foresaids, shall incline to pay up the foresaid sum of £5000, we shall be entitled to do so at any term of Whitsunday or Martinmas, on giving six months' notice to that effect; and in that event, the foresaid sum of £5000 shall be again lent out and reinvested on good and sufficient security, at the sight and to the satisfaction of the Most Noble George, Marquis of Huntly, Adam Gordon, Esq. of Newton, and Captain John Anderson of Candacraig, or the survivor or survivors of them, the security to be taken in the same terms as are above expressed. And in order to secure the reinvestment of the foresaid sum of £5000 as aforesaid, it is hereby declared to be necessary that the discharge to me or my foresaids shall be granted with the consent of the said George, Marquis of Huntly, Adam Gordon, and Captain John Anderson, or the survivors or survivor of them, as trustees for the purpose of carrying the said reinvestment into effect. And I hereby revoke and recall all former bonds of provision granted by me at any time of my life, to and in favour of the said Jane Gordon, my daughter."

The Duke died in 1829, and his trustees paid up the £5000 contained in the bond, upon a discharge from Mrs. M'Intosh, her husband, and Captain Anderson of Candacraig—the other two parties named in the bond of provision having declined to act. The money was then lent to Dr. M'Intosh himself, who bound himself to repay it, in terms of the obligation contained in the original bond of provision. Dr. M'Intosh lent the money to Lord Lovat, who granted an heritable security in favour of Captain Anderson and Hackney Kerr, accountant in Edinburgh, as trustees for Mrs. M'Intosh, her husband, and family.

Dr. M'Intosh died in 1832, and Alexander, the sole surviving child of the marriage, died in 1839. Disputes having arisen between Mrs. M'Intosh and Captain M'Intosh, the sole surviving brother of her husband, as to whether the fee was vested in her or not, a multiplepinding was brought to have that point determined.

GORDON  
v.  
M'INTOSH.  
1845.

PLEADED FOR MRS. M'INTOSH.—It was plainly the intention of her father that his daughter rather than strangers should have the substantial right of fee. The bond bore to be executed out of “love, favour, and affection” towards her, and by it former provisions granted to her were recalled. This was also the strict technical construction of the words employed; for it was settled law that a conveyance to a parent in liferent, and children *nascituri* in fee, without the constitution of a trust, or the use of the term *allenary*, or other terms importing that the parent was constituted trustee for the children, vested the fee in the parent. The nomination of certain friends to see the money reinvested, in case of its being paid up, could not affect the operation of this rule of law. That was merely done by way of check, the better to exclude the husband's interference, and ensure the protection of the wife's interests.

ARGUMENT FOR  
MRS. M'INTOSH.

PLEADED FOR CAPTAIN M'INTOSH.—The bond in question, under burden of Mrs. M'Intosh's liferent, belongs to the claimant as heir and next-of-kin both of his brother, Dr. M'Intosh, and of Alexander, the last surviving child of the marriage. The effect of the destination in the bond was to vest the fee in Alexander. Although a destination to parents in liferent, and children *nascituri* in fee, created a constructive fee in one or other of the parents, in order to prevent its being *in pendent*, yet that was limited to a fiduciary fee for behoof of the children, either by the use of the words “liferent *allenary*,” or similar words, or by any circumstances indicating the intention of the granter that the parents should have no more than a liferent. In the present case, it was plainly the intention of the granter, from the whole terms of the bond, that Mrs. M'Intosh should not have the power of disposing of the provision. This intention appeared especially clear in the appointment of trustees to

ARGUMENT FOR  
CAPTAIN M'INTOSH.

GORDON  
v.  
M'INTOSH.  
1845.

superintend the reinvestment of the money in case of its being paid up. The constitution of a trust was of itself a circumstance which prevented the liferent given to a parent from being construed as a fee. If the fee was not given to Alexander, it was given to his father, the claimant's brother, who was *dignioris sexus*, and on whom the ultimate destination rested. Assuming the fee to be in Mrs. M'Intosh, she could not gratuitously defeat the substitution in favour of her son and his heirs.

LORD CUNINGHAME, Ordinary, "Found that according to the terms and conception of the said original bond, and under the admitted state of the fact, that both the child of the marriage and the said Lachlan M'Intosh have predeceased his wife, the prospective but contingent interest of these parties, under the substitution in the bond, has now ceased; and that the sole interest in the fund secured by the said bond, and the right of uplifting, disposing, and burdening the same at pleasure, is vested in the claimant, Mrs. Jane Gordon."

JUDGMENT.  
Dec. 8, 1841.

Captain M'Intosh having reclaimed, the Court "Adhered."

OPINIONS.

LORD GILLIES.—"I am clearly of opinion that we must give effect to the will of the granter of the provision, if we can find it out. But I do not believe that it was his intention, in the event which has happened, that the provision should be carried away from his daughter. The Lord Ordinary has so fully stated his reasons for the construction of the granter's intention which he has adopted, and in which I concur, that I have nothing to add to them. No doubt the provision was made in contemplation of marriage, but it was also made 'for the love, favour, and affection' which the granter had and bore to Jane Gordon. That was the motive of the grant. Can I then believe it to have been his intention that she was to be deprived of the provision, and that it should go to utter strangers? Then the bond bears that the payment shall be made 'to the said Jane Gordon.' And although it also provides that when the granter inclines to pay up the money, it shall be lent out again in the same terms, at the sight of certain parties, I have no



doubt but this was stipulated in order the more effectually to exclude the husband's *jus mariti*. I can make no distinction between the effect of a destination of land and a money provision to a party in liferent and the children *nascituri* in fee. We must not invert the principle of the case of Newlands. That was a solemn decision, and has been repeatedly followed since, in cases where the fee has been held to have vested in parties standing in a situation analogous to that of Mrs. M'Intosh."

GORDON  
v.  
M'INTOSH.  
1845.

LORD MACKENZIE.—"I am of the same opinion. This is a case of a money provision, granted by a father to his daughter on the occasion of her marriage. It is directed to be paid to the daughter in liferent, and her children *nascituri* in fee, and the question is whether it belongs to the daughter or to the heir of her children predeceasing; that is, whether the fee vested in her or not. If it did vest in her, it is in her yet. If it did not, she has no right—the heirs of her children must take the fee. Now I think that the fee was in her. It was established as a general point by the case of Newlands, that when a grant is made in this way to a parent in liferent and the children *nascituri* in fee, the fee is in the parent, unless the word *allenary* be used, or some other word of full and entire equivalence. That decision has been adhered to, over and over again, in subsequent cases, and these decisions have regulated the practice of conveyancing. The rule was introduced from a legal necessity, contrary to what may have been presumed to have been the intention of the granter. But after it was established, and deeds came to be drawn by skilful and professional conveyancers, the intention of the granter must be supposed to have been according to the technical construction of the terms employed. That very remark was made in the case of Duff in 1810, and in that case, though there were some special grounds for doubting whether the terms were not intended to be used in a different sense, they received their common effect. Are there, then, sufficient specialties in the present case to overrule, in the first place, the difficulty that the fee must have been *in pendent*, unless it vested in Mrs. M'Intosh; and, in the second place, the presumption that the words were used in their technical sense? I rather think, if

GORDON  
v.  
M'INTOSH.  
1845.

we are to guess, from a view of the whole deed, at the meaning of the granter, that it was that his daughter should get the fee. It is true that the grant was in contemplation of the marriage of the granter's daughter ; but it also bears a narrative of love and favour to her, and it was in lieu of all former provisions in her favour, which are revoked accordingly. Favour to the husband is not described as one of the causes of granting, nor anything granted on the part of the husband to the wife. Then there is another grant of an annuity of £200 to his daughter, over and above the provision of £5000 ; and in both there is a careful exclusion of the husband's *jus mariti*. No weight is to be attached to the circumstance that, failing her having children, the provision was to go to her husband, for this was no great mark of favour, seeing that as she was a natural child, she could have no other heirs except her children to take the fee vested in her. But then it is said that there was here a trust constituted, not directly indeed, but contingently. If that were true, there would be something in it ; still it would be a curious thing that a trust, which was to have the effect of overturning the ordinary effect of the destination, should be only a contingent one. But it is not true. A trust would have taken away the objection that the fee was *in pendent*. But all that was provided was, that the money should be reinvested at the sight of certain friends, in case it should suit the granter to pay it up. They were not to hold the money as trustees, but only to see it reinvested. That does not remove in the least degree the difficulty of the fee being *in pendent*, nor is it a solid ground for presuming the granter's intention in favour of the husband. The only argument that struck me was this, that, if she be the fiar, she must have power to uplift the money herself. But this difficulty applies in some degree whoever is fiar ; and, even though the daughter was fiar, I think the provision as to the money being reinvested might be intended as a check upon her, and to prevent the payment of it for the granter's convenience, throwing it loose into her hands. It would be too much to infer from it that there was to be no fee in the wife, or that there was an intention in favour of the husband at her expense. On the whole I am for adhering."

LORD FULLERTON.—" That is my opinion. Holding it to be

the general rule, that a destination to a wife in liferent and her children *nascituri* confers a fee upon the wife, I see nothing in the other clauses of this bond to take the case out of the general rule."

GORDON  
v.  
M'INTOSH.  
1845.

LORD PRESIDENT stated, "That he at first entertained some doubts, but that these had been removed, and he now concurred with the rest of the Court."

Captain M'Intosh having appealed to the House of Lords, House of Lords.  
April 17, 1845.  
"It was Ordered and Adjudged that the interlocutors complained of be affirmed."

LORD CAMPBELL.—"This case turns entirely on the construction of a bond dated 27th July 1825, which was executed by Alexander, Duke of Gordon, on the marriage of his natural daughter; and the question is, whether, in the events which have happened of there being one child of the marriage, and the husband and the child predeceasing the wife, she is entitled to the absolute interest in the sum of £5000 mentioned in the bond, or, subject to her liferent, the money ought to go to the representatives of the husband, either in his own right or as representing the child.

OPINIONS.

"If this had been an English instrument, coming before an English Court, the case would have admitted of no doubt. Most unquestionably the wife would have taken only a life interest in the £5000, and it would have vested in the child or children of the marriage, as they came into *esse*, subject to the power of appointment given to the husband and wife; and if there had been no child, then it would have gone to the husband.

"I must say, my Lords, that if this had been a mere question of the intention of the settler, to be got at from the language he employs, taken in its natural and usual sense, I should come to the same conclusion. He appears to me clearly to have meant to make a provision for the children of the marriage, and for the husband if there should be no children, independently of the acts of the wife. He gives the money to her 'during all the days of her lifetime, and to the children to be procreated of the marriage in fee, in such proportions as the husband and wife should appoint, and failing issue of the mar-

GORDON  
v.  
M'INTOSH.  
1845.

riage, to the husband in fee.' Now, the only footing on which it is contended that she is now entitled to the absolute interest in the money is, that she took the fee in it under the bond, with power at any time, for onerous cause, living children of the marriage, and living the husband, to have alienated the whole of it. But the words employed naturally import that she should merely take a life interest, and this meaning is strengthened by the directions as to the manner in which the money is to be secured and the interest is to be paid.

"But we are bound to construe this Scotch bond according to the rules of the law of Scotland, and there turns out to be a rule in that law, often recognised, that if there be a sum of money given to a parent in liferent, remainder to children *nascituri* in fee, the parent takes a fee in the money, with a power of alienation for onerous cause, unless the word *allenary*, or some word of equal force, be added to the clause describing the life interest of the parent. I have examined the case of Newlands, and the other cases cited at the Bar, (which it is unnecessary to enumerate,) and I think they fully establish this rule. I am not at liberty to inquire into the reasonableness of it, or how far strict feudal principles, by which the disposition of real property has been regulated, ought to have been applied to the settlement of a sum of money as a provision for a family on marriage. The decisions of the Scotch Courts make no distinction between land and money in this respect, and with regard to money, treat such a disposition to the parent for life, remainder to the children *nascituri*, without the word *allenary*, as in effect a simple destination, which may be defeated by the parent who is considered the *fiar*. If the word '*allenary*' is added, this is tantamount to fencing clauses in a deed of entail, and prevents alienation, though still the parent would be the *fiar*.

"I cannot say that the word '*allenary*' more clearly expresses the intention of the settler, who, when he gives a life interest to the parent and the fee to the children, can hardly intend that the parent should take the fee. But I consider that we are bound by the long and uniform current of authorities, and that these interlocutors, which have been unanimously pronounced by the Judges below, ought to be affirmed with costs."

LORD BROUGHAM.—“ My Lords, I concur with my noble and learned friend who has just addressed the House. Originally I did entertain considerable doubt upon this case ; because I could not help feeling that if this question had arisen here, there would have been no doubt about it ; but when I come to look into the authorities and the text writers down to the very latest period, (and no one text writer has stated more clearly the principle than Mr. Bell in his very excellent work, his ‘ Abstract of the Principles of Scotch Law,’ sections 1713 and 1923,) looking to those authorities and to the decided cases, the law of Scotland appears to be very clear, particularly in that very strong case of Newlands, which seems to have gone to the very verge of the law in this respect, so far as regarded the opinions of the Judges, and of Lord Chancellor Loughborough in this House ; for that case would have almost carried it to a fee in the parent, notwithstanding the word ‘ allenary ;’ it was within an ace of going to the parent, although the word ‘ allenary’ existed in the instrument. How then can it be contended, that without ‘ allenary’ it would not have gone to him ?

GORDON  
 &  
 M<sup>c</sup>INTOSH.  
 1845.

“ The principle seems to have been taken from the feudal law treating money as a feudal matter, which was the tendency of all the old law in every country of Europe at one particular time. You find it in the French law, you find it in the German law, you find it less perhaps in the Dutch law, they being a more mercantile community probably ; and you find it in the law of all the Italian States. I have had occasion to look, for other purposes, into the foreign systems of jurisprudence, and I find that, for a long period of time, about two centuries or more, there was a general tendency to feudalize everything,—they feudalized all the great offices of the country, they feudalized employments : in private manors they feudalized grants of every kind, rights of fishing and so forth, and rights of chase ; and in the same way they feudalized money and they feudalized personal chattels ; and accordingly, the Scotch law, not less feudal than the rest, but perhaps even more feudal than any other system, had a tendency to introduce feudal principles into the disposition and dealing with personal chattels : whence is the origin of this ? It is the holding in abhor-

GORDON  
 v.  
 M'INTOSH.  
 1845.

rence the doctrine of the possibility of the fee being *in nubibus*, of which we have very frequent traces in our old feudal law with respect to chattels and real property. It held, that money could not be otherwise granted than according to the general feudal rules ; and therefore, in the case of a grant simply of money, or a chattel interest to A in liferent and to B in fee, (without taxing words, without the word 'allenary,') or to A and B in conjunct liferent, (a very common case,) 'and to their children *nascituri* in fee,' or a gift in any other way to unborn issue in remainder, as we should call it, after the takers for life, the rule was, that the fee was first granted to the parties *in esse*, unless there were words to tie up the interest given to the parties *in esse* to a mere life interest.

"Now that word 'allenary' is a more solemn and usual word, and that word is sufficient to restrict the interest to a life interest, unless other words are to be found in the instrument which will impeach and diminish the effect of that word. There may not be a life interest merely if the word 'allenary' be defeated in its operation by those other words. But if that word exists and be undefeated by other words in the instrument shewing the intention, then it will restrict the interest of the parent, the first taker, to a life interest, and preserve the fee to the children *nascituri*.

"Now the case of John Newlands shews how strong the principle is. That case was argued before the whole Court sitting in the most solemn form, and there seems to have been a very great disposition on the part of several of the Judges, constituting, however, the minority of the whole, even in that case with the word 'allenary' in the will of the testator, to give a beneficial interest to the parent, and to defeat the interest in remainder expectant upon the termination of his life interest in the issue ; and the Lord Chancellor, Lord Loughborough, leaned towards that opinion, so strongly imbued was he with the principle. Nevertheless, the decision was that the word 'allenary' was sufficient there, and was not defeated in its operation and effect by other words ; that it was sufficient to convey to the children the beneficial interest, and to the parent a life interest only. However, it is to be remarked, that in these cases there is still a fee given to the parent, from

the abhorrence of the possibility of the fee being *in nubibus*, but it is only a legal fee ; he being a trustee for the unborn issue, he takes what is termed in that decision a fiduciary fee.

GORDON  
v.  
M'INTOSH.  
1845.

" Now, my Lords, in this case there is no such expression ; there is nothing to limit the grant, there is no such word as ' allienarly ; ' there is nothing to get rid of the grant, and, consequently, there is nothing to prevent the legal principle having its operation. For these reasons, however much I may lament it, (for it is quite clear what the intention was,) I entirely agree in opinion with my noble and learned friend.

" I cannot help here adverting to what I must say, in my view, is of the greatest authority and weight, the venerable authority of Lord Corehouse, in one of these cases, *Mein v. Taylor*, in the year 1827, in which he says, in a note to his interlocutor to which the Court adhered, ' Where a conveyance is made to one in life rent and his children unnamed and unborn in fee, it is settled law that the fee is in the parent, and that the children have only a hope of succession to prevent the infringement of the feudal maxim that a fee cannot be *in pendent*. It is perhaps to be regretted,' his Lordship says, (and I am sure I entirely join in that regret, and from what my noble and learned friend let fall probably he joined in that regret also,) ' that the point was so settled, because the plain intention of the maker is a consequence often sacrificed to a mere form of expression, and the feudal maxim might have been saved by supposing a fiduciary fee in the parent, as is done when the life rent is restricted by the word " allienarly " or " only." ' Now that would have got rid of the whole difficulty, and there would have been no fee *in nubibus* any more than there is when the word ' allienarly ' is added, for then it is allowed that there is a fee, that the legal estate, a fiduciary fee, is in the parent, and it might just as well have been so settled. ' Upon this point, however,' says his Lordship, ' it is too late to go back, but certainly the principle ought not to be extended to cases which have not yet been brought under it.' That is quite certain. Now if this had been a case which had not been brought under it, one might have had some ground for doubt, but it is a case which has been brought under it, and it falls within that principle, in my humble opinion, so clearly,

GORDON  
v.  
M'INTOSH.  
1845.

(and we cannot get rid of that principle of law,) that, however much we may regret that it has been adopted, it is too late, as Lord Corehouse says, to go back ; it falls within the principle ; it is too late to reconsider it, and we are bound by it. I therefore agree with my noble and learned friend, that we have no course to take but to affirm the judgment of the Court below."

LORD COTTENHAM.—" My Lords, it is a matter of some surprise, that where the Courts in Scotland have professed to act upon the intention of the authors of such instruments, they should have prescribed one word—one word only—by which the party is at liberty to express that intention ; and that even where the Court have no doubt of the intention, yet if that particular word be omitted, the Court have not the means of carrying into effect the intention. That is the professed object in general of the Court, and had not the decisions been to the contrary, I should have said that that would have been their duty.

" Now, in this case, there can be no doubt of the intention of the maker of the instrument. It is clear that he meant that the daughter should enjoy the interest of the property for her life, and that her children should enjoy it after her death. But although he has expressed that intention, so that nobody can misunderstand it, he has not used the technical term, which alone the Court of Scotland deals with, rather than inquiring into the intention of the party.

" It cannot, however, after the decisions which have taken place, be a matter in dispute, that the frame of this instrument falls exactly within the terms of the decided cases, and that the daughter took the fee not only in a fiduciary character, but beneficially ; that it was subject to her own control, and that she had the power therefore of defeating the interest of her children. But the argument was pressed principally upon the clause which provided, in the event of the money being paid, for its reinvestment, and thence it was inferred that this either amounted to an expression of intention as clear as if the particular word ' *allenary* ' had been used, or, which is the same thing, that it actually created a trust which would have been sufficient if such had been the intention of the original framer of the grant.



“ Now it would be strange indeed, if, in the very same instrument, the Courts were to reject an intention so palpably plain as it is from the terms in which the gift is made, and say, that that did not impart an interest for life only and a gift over to the children, but come to a conclusion in favour of the entail of the property from a subsequent clause in the same instrument, made for a totally different purpose. In fact, the terms of that provision, which relates to the reinvestment of the money by lending out the fund in the event of the bond being paid, clearly had no reference to the extent of the interest which the parties were to take, but merely provided that, in the event of the money being paid, and paid to the mother, for she was at liberty to receive it, it should be lent out again to be taken in the same terms. Now, supposing it had been paid and lent out in the same terms, which would have been following strictly the directions of the author of this gift, we should then have found the money lent out in precisely the same terms in which the rights of the parties are declared in the earlier part of this instrument ; it would not have extended the rights of the parties beyond that which was found previously to exist.

GORDON  
v.  
M'INTOSH.  
1845.

“ It appears to me, therefore, very clear, that the subsequent provision as to the lending the money out in the event of its being paid, cannot operate upon the construction to be put upon the terms of the gift, and the terms of the gift are such as upon the decided authorities give the fee to the parent.”

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1. In the case of *KENNEDY v. ALLAN*, February 19, 1825, Mrs. Buchanan granted a gratuitous disposition of certain heritable subjects “ to Mrs. Jean Buchanan, in liferent, during all the days and years of her lifetime, excluding the *jus mariti* of her husband, and declaring the subjects hereby disposed to be an alimentary provision, and not subject to the

debts or deeds, or applicable by the creditors of her husband ; and failing of her, to Mary and Elizabeth Allan, children of the said Jean Buchanan, in liferent ; and failing of them, to the lawful heirs of their bodies ; whom failing, to my own heirs, disponees, or assignees whomsoever, in fee.” Infestment followed upon this conveyance, and thereafter the granter

granted another disposition, by which she conveyed the same subjects to the pursuer, Mrs. Kennedy; and on the death of the granter, the pursuer was infeft on this second conveyance. The daughters of Mrs. Allan having sold the property, the pursuer brought an action of reduction of the sale, on the ground that their right was restricted to a mere liferent, and that therefore they had no title to sell the subjects. In defence it was PLEADED, That the clause in favour of Mrs. Allan's daughters imported a fee, and that as they were infeft, and the granter had reserved no power to alter, the daughters were the exclusive fiars. LORD ELDIN "Repelled the reasons of reduction, and assoilzied;" and LORD MEDWYN, on a representation, found, "That by the conception of the late Mrs. Buchanan's deed in favour of Mrs. Allan in liferent, and failing of her, to Mary and Elizabeth Allan, her children, in liferent, and failing of them, to the lawful heirs of their bodies, whom failing, to my own heirs, disponees, or assignees whomsoever, in fee, the fee of the property in question is in Elizabeth Allan, now that her sister is dead without issue; and this construction is founded on repeated decisions of the Court, but mainly on the cases of *Douglas v. Ainslie*, 7th July 1761, and *Lindsays v. Dott*, 9th December 1807: That Mrs. Buchanan reserved no power to alter said disposition, and therefore that she could not execute any subsequent deed, so as to injure or affect

the right previously constituted in favour of Mary and Elizabeth Allan, supposing that the subsequent conveyance in favour of Mrs. Kennedy could have such effect; that Elizabeth Allan is not fettered by any prohibition, express or implied, against selling the property: and that with concurrence of her mother, the liferentrix, she had sufficient power to execute the deed under reduction." The pursuer having reclaimed, the Court "Adhered."

2. In the case of *M'DONALD v. M'LACHLAN*, January 14, 1831, a husband bound himself in his marriage-contract "to provide and lay out the sum of £500 upon well holden land, or other sufficient security," at the sight of a third party, and "to take the rights and securities thereof, payable to himself and his promised spouse, and the longest liver of them two, in liferent, and to the children of the marriage in fee; whom failing, to himself, his heirs and assignees whatsoever, declaring that in the event of more children than one, the fee is to be divided among them by such divisions and proportions as the father shall think fit to appoint by a writing under his hand." He afterwards took a bond for the sum of £500, in which the debtor stated that he had undertaken to grant a bond "in terms of the said marriage-contract." The bond was conceived in favour of the husband and wife, "and the longest liver of them two, in liferent, and to the children already procreated, or to be procreated of

their marriage, in fee; whom failing, to the husband, his heirs and assignees whatsoever." The bond contained a similar declaration to that in the contract, as to the power of the husband to apportion the sum among the children as he should think proper. On the husband's death the bond having been attached by his creditors, the question was raised, Whether the fee was in the father or in the children? LORD COREHOUSE, Ordinary, Found "That the fee of the bond of £500 sued for was vested in the person of the late Mr. Bell M'Lachlan at the period of his death, and was attachable by his creditors."

3. The children having reclaimed, the Court "Found, That in this case the bond must be interpreted in conformity with the import of the relative marriage-contract; and therefore Adhered." LORD BALGRAY observed, "I have carefully looked over the decisions since 1663, and must either unread all that I have learned by that perusal, or adhere to this interlocutor. I should be sorry to see it altered. There are two deeds in question: The first is the marriage-contract, and the second, the bond by M'Lachlan. The bond bears *ex facie* to be granted in implement of the marriage-contract; and if any question arose from the doubtful meaning of the provisions of the bond, we should be called upon to explain these consistently with the plain terms of the marriage-contract, which is the ruling deed. But if the bond stood here alone, I see no

difficulty in deciding on its legal import, as clearly vesting the fee in the father. All the obligations in the bond, however, required to be construed referably to the marriage-contract; and if we turn to it, do we there find a fee in the children? On the contrary, its precise terms have been held, over and over again, to vest the fee in the father. He is taken bound to stock out the sum, and take the rights, payable to himself and his wife in liferent, and to the children in fee. That leaves the children merely heirs, with nothing but a *spes successionis*. It is true, the father cannot gratuitously disappoint them, but any creditor of his may attach the whole fund so provided. I may observe also another test, sometimes applied to discover where a fee is vested. Suppose the question to be, which of two spouses is fiar, and that the sum had not come through the husband, as in this case, but through the wife? The one test might be, in whose favour is the first destination after the children are exhausted? Here it is the father, the party providing the fund. These are clear rules for fixing the fee in him; and how is it that the defender attempts to make an exception from them? It is said, first, that the terms of the bond are changed from those of the marriage-contract. The fee is payable under the contract to children who are all *nascituri*; in the bond it is made payable to children 'procreated or to be procreated.' But still these children remain mere heirs. They would require a

service just as much in this case as in the other. This very point was expressly decided 170 years ago; and I remark it in order to put an end to all future discussion of a point like this. It is true, the words then used were 'gotten or to be gotten,' but I fancy these are much the same with 'procreated or to be procreated;' and it was expressly held that the fee was in the parent, and not in the children. In the second place, the defender says there was a power of distribution reserved to the father. It is always so reserved, and no change is thereby made on the nature of the estate in him as a fee. If the interest on the sum had been taken payable to the children in the lifetime of the father, that would have been a different case. It would have been like the case of M'Kenzie of Redcastle. But there is no such provision here. Again, we have not this sum vested in trustees for the preservation of the respective interests of the parent and children; the only thing like it is, that the sum is to be stocked out on good security, at the sight of the wife's father. That natural precaution produces no change on the relative rights of the fiar and the heirs."

4. LORD CRAIGIE dissented, and observed—"Few words of technical use are so uncertain in their meaning as those of 'conjunct fee and liferent,' which are employed in marriage-contracts, and other deeds, for settling the interests of the husband and wife; and those which are in use for providing the

children of a marriage by rights or obligations to the parents in liferent, and 'to children procreated or to be procreated in fee,' seem liable to the same uncertainty. With regard to the former, we shall find, that whatever general rules may have been laid down for construing these words, they all bend to the probable intention of the parties in each particular case; and as to the latter, the import of which has been thought to be settled on general grounds in the case of Newlands, decided in the House of Lords in 1795, it has not been attended to, that the Lord Chancellor Loughborough, who decided the case, took the only means of intimating to the parties and the public, that at the time he did not mean to determine the general question. In this case the words in the bond, although in part different from those in the marriage-contract, do not seem to have altered the rights of the parties. The case might have been different, if the bond had been 'to the children procreate in fee,' there having been no children afterwards born. But where the provision is to children procreated or to be procreated, no distinction has been received in our practice, arising from the state of the family when the rights or securities are completed. In this case the following observations occur:—1. Trustees were appointed for enforcing execution of the marriage-contract, and these not merely in favour of the wife, but also in implement of the provisions to the children. In this manner, the

effect of the rule that *dominium non potest esse in pendente*, was taken away ; the person so named standing at all times in the right and place of those favoured by the deed, and authorized to claim and do everything which may be necessary for their advantage. 2. The liferent (there is no conjunct fee) is not given to the husband alone, but to the two spouses, and the survivor of them, and the wife survived the husband. Thus there were not either a liferent or fee in the husband when the arrestment was used by the pursuer. After the husband's death the children, (or their trustees,) with the consent of their mother as liferenter, might have uplifted the sums in the bond, or, even without the mother's consent, upon finding security in the same manner as in any other liferent right. 3. There is a power given to the husband to distribute the sums in the bond ; but what could be the use or meaning of this, if he were truly *fiar*, and so having full power to do so ? 4. If, by the terms of the bond, the fee was vested in the father, his heirs and assignees, what was the use of the substitution which immediately follows in favour of the father, if the fee had from the beginning been in him ? Or is it not necessarily to be inferred that the father could not take the fee, unless upon the failure of his children ? Upon all these grounds, I still entertain great doubts as to the interlocutor which has been pronounced by the Lord Ordinary, so far as it finds that the sums in

question were so vested in the late Mr. Bell M'Lachlan, as to be liable to arrestment by his creditors."

5. LORD GILLIES observed—"I concur so entirely with Lord Balgray, that I shall express my opinion in very few words. It is true that there are many terms used by lawyers, the precise import of which was long doubtful, so as to give rise to much hardship and regret ; but this very circumstance renders it doubly imperative on us, after a positive signification has been attached to them, to adhere to it scrupulously and inflexibly. Now, if there be any form of words to which a certain definite legal import has been rivetted by a multitude of decisions, it is that form of words which we are now called on to consider. And thus I hold it to be fixed, that when any estate, whether real or personal, is conveyed to husband and wife in conjunct liferent, and to their children in fee ; whom failing, to the heirs of the husband, the fee of that estate is in the husband. These last words decide where the fee lies. Had the destination been to the children, whom failing, to the wife's heir, the fee would have been in her ; and thus the very words which have been just quoted, as importing that the fee was not in the father, are precisely those which fix it to be actually in him. All this I had thought to be settled, and therefore that, by the marriage-contract, as found by the Lord Ordinary, the fee was in the husband. But a doubt is thrown on this, owing to the terms of the

bond. If I had to look at the bond by itself, I should still, without hesitation, pronounce the fee to be in the husband. But I am not entitled to consider the bond as an isolated instrument. It bears *ex facie* to be executed in terms of the marriage-contract, and for the purpose of giving effect to that deed. How then can I give any weight to the suggestion, that it was the intention of parties by the bond to alter those rights, which, on the contrary, the bond bears it was their purpose to implement? I think their rights the same under the bond as under the contract, and I think they were meant to be the same."

6. LORD PRESIDENT HOPE observed—"If we must construe the bond as merely giving effect to the contract of marriage, I shall concur with the majority of your Lordships. But by the law of Scotland, notwithstanding the existence of a contract of marriage,

which confers a fee on the father, he may afterwards, if he please, propel the fee to the children during his own lifetime, and so make them better than they were before. I doubt, therefore, whether this bond was not meant to give effect to an arrangement like this, as there were children already born at the date of its execution. Though these children were not named in the bond, that circumstance is no impediment to their being the true fiars, as they were already born at the date of it. My difficulty is, whether we can construe the bond without reference to the marriage-contract. I rather conceive we cannot do so; and it is only on that account that I am for adhering."

7. LORD GILLIES—"If it had been the meaning of parties to give a right of fee to the children, they might easily have added the word 'allenary' to the liferent right of the spouses."

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*A Conveyance to a Parent in liferent, for his liferent use allenary, or under restrictive words of similar signification, and to his children nascituri in fee, imports a right of liferent in the parent, and also an interim fiduciary fee in him for behoof of the children.*

#### 1.—NEWLANDS v. NEWLANDS' CREDITORS.

April 26, 1798.

NARRATIVE.

IN 1771 Alexander Newlands disposed certain heritable subjects to his natural son, John Newlands, "during all the days of his lifetime, for his liferent use allenary, and to the

heirs lawfully to be procreated of his body, in fee;" whom failing, to the granter's nearest heirs whatsoever.

By a trust-deed he conveyed the remainder of his heritable and moveable property to trustees, for payment of his debts and funeral charges, and certain legacies, and upon his natural son, John Newlands, arriving at majority, the trustees were directed "to denude themselves of the heritable subjects, and dispone the same to the said John Newlands, in liferent, for his liferent use allenary, and to the heirs lawfully to be procreated of his body, in fee, &c.; and also, at his majority, to assign and convey to him and his heirs, whom failing, to my nearest heirs, &c., what may be outstanding and unrecovered by them, or in their custody and keeping of my debts and effects." These deeds being reducible on the head of death-bed, John Newlands obtained from the Barons of the Crown a gift of *ultimus hæres* of the heritable subjects contained in them. The gift was granted precisely in the same terms with the disposition, namely, "Joanni Newlands durant. omnibus suæ vitæ diebus, pro ejus vitali redditu solummodo, et hæredibus legitime ex ejus corpore procreand. in feodo; quibus deficien. propinquieribus legitimis hæredibus dict. demortui Alexandri Newlands quibuscunque."

John Newlands having afterwards become insolvent, a process of ranking and sale of his heritable property was brought, which included the subjects contained in the gift. In the course of the process, a petition was presented by the eldest son of John Newlands, stating that his father was merely a liferenter of these subjects, and praying the Court to ordain these subjects to be struck out of the sale, in so far as concerned the fee.

PLEADED FOR THE CREDITORS.—Two points may be considered as settled,—*First*, That a fee cannot be *in pendente*; and, *second*, That the case of Frog is now a fixed rule of law. These propositions being granted, the question is much narrowed, and resolves into the following point, Whether the addition of the words, "for liferent use allenary," ought in law, or does in practice, make any difference on the extent of a right taken to one in liferent, and to his children *nascituri* in fee?

NEWLANDS  
v.  
NEWLANDS'  
CREDITORS.  
1798.

ARGUMENT FOR  
CREDITORS

NEWLANDS  
v.  
NEWLANDS'  
CREDITORS.  
1798.

. It being admitted that the case of Frog is an established rule, it would have been unnecessary to have taken further notice of it, or of similar cases, if it were not proper to shew the principles upon which these cases have been decided. These cases were not decided on the single principle of a regard to the *presumpta voluntas testatoris*, but upon this other principle, that a fee cannot be *in pendente*, and directly in the face of what was understood to be the *enixa voluntas testatoris*.

With regard to the case of Frog, the best evidence that can be brought of this position is to be found in Kilkerran ; and from him it appears that although at first the Court, moved by the *voluntas testatoris*, found that the fee was not in the nominal liferenter ; yet afterwards they, *ex necessitate juris*, thought themselves obliged to alter that judgment, and to find that the fee was in him. It also appears, from Lord Kilkerran, that the Court pronounced their judgment with equal regret in the case of Lillie against Riddell. The Court saw, in the maker of the deed, a double *voluntas testatoris*. The grand and primary will was to give the estate to a particular family ; the secondary and subordinate will, related to the mode of giving ; and they justly gave effect to the primary and catholic will, by giving the estate to that family, in the way permitted by law. This distinction solves every difficulty in the case, and reconciles the *voluntas testatoris* with the structure of the law. It explains, on clear principles, the decision in the case of Frog, and that in the case of Lillie against Riddell : for, satisfied that the fee could not be *in pendente*, and seeing that the settlement, if strictly interpreted, must have reduced it to that state, the Court acted with a just regard to the *voluntas testatoris*, carrying the estate from the testator to the family which he meant to favour, but rejecting the mode and condition of the settlement ; preferring the substance to the form.

This was the principle of the decision in the case of Frog. It was then held, as it is now, that a fee cannot be *in pendente*, and upon that principle the settlement should have been disregarded ; but the Court gave it effect. It therefore remains to shew, that it was upon the principle of supporting the *voluntas testatoris*, so far as agreeable to law, and disregarding it in



subordinate points, in so far as it was contrary to law. Let it be considered then, what evidence the Court had of the *voluntas testatoris*; and that must depend upon the meaning which the words of the settlement conveyed to the Court, as affected by the cases which had formerly occurred.

NEWLANDS  
v.  
NEWLANDS'  
CREDITORS.  
1798.

At what period settlements to a person in liferent, and to his children *nascituri* in fee were introduced, is not clear; but this at least is certain, that the word liferent, however much it may be distorted from its original meaning, was a word early known in the law of Scotland, and that its legal and technical meaning was synonymous with its vulgar meaning. It was the usufruct of a subject during a person's life; and this is still the technical meaning of the word, unless in one or two very particular circumstances. Therefore, when the first settlement to a person in liferent, and his children *nascituri* in fee, came before the Court, they could have no doubts as to the *voluntas testatoris*. Why then did the current of the decisions run so strong the other way, as at last to compel the Court, on the solemn occasion of the case of Frog, to give only a partial effect to such a settlement? It was from a conviction that such a settlement, taken strictly, was contrary to the genius and principles of the law with regard to heritable rights; and as the Court could not make the law yield to the will of the testator, they made the will of the testator so far yield to the law. In the case of Frog, therefore, they finally established this principle, that as the father could not be a mere liferenter, because the fee could not be *in pendente*, and as they saw a clear *voluntas* on the part of the testator, to give the estate to the family of the liferenter, they determined that the fee must be in the liferenter, as the only possible way of reconciling the *voluntas testatoris* with the law of the land. In one word, the principle of this decision is this:—The Court sustained the settlement to the effect of carrying the estate to the disponent and his family, because, in this respect, the will of the testator was consistent with law: they gave the absolute fee, and not the liferent, because a liferent would have been inconsistent with the general principle, that a fee cannot be *in pendente*: and they gave an absolute fee in preference to a fiduciary one, because since, *ex necessitate juris*, there was to be a fee, they could find no

NEWLANDS  
v.  
NEWLANDS'  
CREDITORS.  
1798.

grounds for determining how it was to be limited, or to what extent it was to be fiduciary.

Then comes the question, What change ought to be made by the words "for his liferent use allenarly?"

In the *first* place, speaking either grammatically or technically, the word "allenarly" can make no difference upon the case; for it is an universal rule, that where any word or expression has a precise taxative meaning, the addition of the words "only," or "allenarly," will not make it more so. As little can the addition of the words "for his liferent use" make any alteration on the case. A liferent use is the use of the subject during the person's lifetime; and as every liferent is created for no other purpose, it is one of those tautologies which are made use of by persons whose anxiety is greater than their skill.

*Secondly*, Supposing that the use of these expressions should indicate a greater degree of anxiety to send the fee to the children *nascituri*, and consequently to make the fee *in pendente* or fiduciary, till they do exist; then it is answered, that, according to the cases of Frog and Lillie, it is not in the power of the testator to make such a settlement. When a thing is illegal, the intention of the private party cannot support it. Thus rights of an heritable nature cannot be conveyed in a deed really of a testamentary nature, nor would words the most anxious render the conveyance valid. Further, the most anxious expressions would not be allowed to defeat the law of deathbed: and many other cases may be supposed to the same purpose.

The petitioner's construction of his grandfather's settlement appears to be attended with inextricable difficulties. For instance, if a church or a manse were to be built, who would pay the assessment? Not the liferenter, for he could only be liable for the interest of the sum during his life, and the supposed *fiar* not being in existence, it could not be obtained from him. Suppose also houses on the estate required to be repaired, or a farm-steading requires to be built, how is the money to be borrowed for that purpose? Can the liferenter, in the character of fiduciary *fiar*, grant an heritable security over the property for that purpose? There is no clause in the deed authorizing

him to do so. Besides, were he at liberty to borrow money for alleged necessary purposes, there would be an end to the trust-fee ; for, on pretence of one useful purpose, he might borrow the same sum from many different persons, every one of whom might be *optima fide* in lending to him, and of course all their debts would be good against the estate. On the other hand, to deprive him of the power of borrowing for necessary purposes, would be extremely detrimental to the subject.

It is clear that the supposed fiduciary fee can only be inferred from implication. *Ex figura verborum*, the donee is but a liferenter in the strictest possible sense of the word. Not only therefore must the trust itself be inferred by implication, but the whole powers and duties of the trustee must also be left entirely to inference and conjecture. To such implied trusts as that contended for in the present case no effect ought to be given, and in accordance with the rule established in the case of Frog, the donee ought to be regarded as liar.

NEWLANDS  
v.  
NEWLANDS'  
CREDITORS.  
1798.

PLEADED FOR THE ELDEST SON.—The simple question at issue is, What right is conveyed by a grant of an heritable subject to a person in liferent, for his liferent use *allenary*, and to his children in fee, or to other persons *nascituri* in fee ? However explicit it may sound that a grant to a person in liferent, for his liferent use *allenary*, is merely capable of conveying a liferent interest, it is contended that this is a mistake, for that when these words are accompanied with a grant in fee to persons yet unborn, and so incapable of holding a fee, the law rears up, by construction, an absolute fee in the liferenter, by which he or his creditors are enabled to disappoint the succession of the fiars in expectancy. In order to support this proposition, it is maintained that such a fee has already been inferred in cases of grants to persons in liferent, and to their children in fee ; that the addition of the word “*allenary*” does not indicate the will to confer only a liferent more clearly than a simple grant in liferent in common sense ought to do, and that there is a *necessitas legis*, which requiring the raising by construction a fee in the one case, authorizes equally the raising it in like manner in the other. It is contended that a fee cannot be *in pendente*, and that a fiduciary fee is a thing unknown

ARGUMENT FOR  
ELDEST SON.

NEWLANDS  
v.  
NEWLANDS'  
CREDITORS.  
1798.

in the law. But even although it were admitted that a fee cannot be *in pendente*, and that a fiduciary fee was a thing unknown or inextricable, it would never follow that a fee ought to be given to a person to whom no more than a liferent was intended. All that the Court could do would be to sustain the grant of the liferent, and to leave the fee to have been taken up by the heir *alioqui successurus*.

The supposed *necessitas juris* for raising a fee of some sort is founded on the maxim, that a fee cannot be *in pendente*. But if by this is meant, that there must be some person who has a right of making up titles as fiar, it is denied that any *necessitas juris* for raising constructive fees is deducible from that maxim. If, on the other hand, it is meant that, by the common law of Scotland, there must always be some person *in titulo* to hold the entire fee, and that the property will be affected by such person's acts and deeds, then the maxim is denied. There are no proper *necessarii hæredes* with us. Even in the state of apparençy, the greater part of the powers of ownership are suspended, and in some sense *in pendente*. A disponee may decline to accept, and an heir may repudiate; and when an heir repudiates, the next heir cannot serve. Where then is the fee? In one sense it is *in pendente*, as there is no power in the law to create a property in any person during the life of the heir repudiating, without acquiring right from him by some act or deed of his. Again, the superior is not to be defrauded by this conduct of his rights of superiority; and the law gives him the casualty of nonentry for his indemnification. But though the superior get possession by declarator of nonentry, he does not become owner of the *dominium utile*, although he were to possess for more than the years of prescription. Here, therefore, there is a fee *in pendente*; and cases happen where heirs find it out of their power to enter, as, for instance, when they would incur an irritancy of a more valuable property.

A clause, declaring that an heir existing shall not enter during the possibility of a nearer heir in expectancy, will be effectual. The decisions varied upon this point where there was no express will, till the case of Sir George Mackenzie of Rosehall in 1708, when it was fixed in favour of the heir in exist-

ence, excepting when the will of the testator should direct it otherwise ; and the inference is, that, in the law of Scotland, the fee may be substantially pendent, though, in another sense, it may, to a certain degree, be held to be otherwise. Lord Stair says, “ that the fee must necessarily belong to some person : it cannot hang in the air on a future possibility ;” by which undoubtedly is meant that there must be a *jus delatum* to some person, who, however, may take up the succession or not as he pleases ; the law being satisfied with setting up a person who is sufficiently *in titulo*, for the sake of third parties. In the case of Frog, the maxim is made to arise—1. From the necessity of finding a vassal ; 2. From enabling creditors to affect the estate ; 3. From the danger of the fee becoming caduciary. The last of these evils is merely imaginary. It is impossible that fiars *in spe* can be infeft, so as to divest the ancestor ; and as to the other hazards, the law satisfies the superior, for his vassal, if a liferenter, is entered ; if not, he has his nonentry ; and creditors again may always attach the estate, by directing charges against the heir *alioqui successurus*.

NEWLANDS  
v.  
NEWLANDS’  
CREDITORS.  
1798.

If the fiar be right in this deduction, the creditors have not the shadow of a case ; for the case comes simply to this, the will of the testator to grant a mere liferent to Lieutenant Newlands is not disputable ; and this grant will be valid, and the grant of the fee to his children in expectancy will also be valid, without ascribing an intermediate fee to Lieutenant Newlands. The fee, till the existence of these heirs, according to the cases of Carleton and Forbes, remains with the disposer, and in his *hæreditas jacens*, or in the heir *alioqui successurus*, till the fiars in expectancy exist ; and here the fiars in expectancy exist, and are entitled to take up the fee from the *hæreditas jacens* of the disposer.

The doctrine, that fiduciary fees are inextricable, and unknown in the law of Scotland, will not be readily adopted. The Roman law, one of the great fountains of ours, admitted fiduciary fees. When a succession opened where there was a nearer heir *in spe*, the existing heir was held to be merely a *fiduciarius* for the heir expected ; l. *penult. et l. ult. Cod. Commun. de Legatis*. And in the law both of this and of the

NEWLANDS  
v.  
NEWLANDS'  
CREDITORS.  
1798.

sister kingdom, fiduciary fees are a constant resource for accomplishing the wills of parties.

But the *fiar* does not mean to say that the powers of a fiduciary *fiar* are attended with the powers usually given to express trusts. A fiduciary fee is the mere fiction of law, deriving no power from the grant of the testator, but merely having such a character as courts of justice find it necessary to attribute to it, in order to carry into effect the will of the testator, agreeably to principles of law. Were a Court to act otherwise, it would dispose of the testator's property without his consent, and take it from the person to whom he had destined it to go. To adopt a fiction for the ends of justice is perfectly competent; and if the Court are of opinion that it is proper to consider Lieutenant Newlands as a fiduciary *fiar*, the real *fiar* has no interest to oppose it, for he does not conceive that that character is attended with any right of administration.

JUDGMENT.  
Feb. 7, 1794.

The Court "Ordained the whole heritable subjects specially described in the gift of *ultimus hæres*, to be struck out of the sale of the subjects belonging to Lieutenant Newlands, in so far as regards the fee of the subjects."

OPINIONS.  
MS. Notes,  
Elphinstone's  
Session Papers.

LORD ESKGROVE.—"When any doubtful point on the meaning of technical terms is once settled by solemn judgments of this Court, it is most dangerous to alter it, as every person relies on the meaning and import of these terms as explained by the judgments of the Court. In cases of conjunct fees to husband and wife in marriage-contracts, the husband is in general understood to be *fiar*, if not otherwise explained in the contract, as what is settled by marriage-contracts is given the husband *ad sustinenda onera matrimonii*. In other cases questions have occurred upon deeds not marriage-contracts. I have always doubted of the decision in the case of *Frog*, 25th November 1735, and it is doubted of by Lord Kilkerran in his Decisions. It is said the fee cannot be *in pendent*. To a certain effect that may be true. Suppose a person disposes his estate to a nominal person not in existence, a mere name, there can be no fee there, it remains with the granter. The case of *Newlands*, now before the Court, is not that of a marriage-contract,

but of a donation by a father to his natural son, who must be considered as a stranger. Is there anything that could hinder this father from giving a liferent to his son without giving a fee? for if it is said that a fee cannot be *in pendente*, it remains with the father. It is said that this is a mode of creating entails not authorized by the Statute 1685. There is nothing in that observation. No creditor contracting with a liferenter, having no right more than a liferent in him, can afterwards say with justice that he is hurt, as had he, as he ought to have done, examined the right of the person he contracted with, he must have seen it was only a liferent. In this case I incline to be of opinion, that without the word *allenary*, no more than a liferent was given; but when I take the declared will of the granter, that the right is given for liferent use *allenary*, or only, I cannot hesitate to think that no more than a liferent was given. I never had a doubt that in such a case as the present this was the sense of the words, and so understood by every practitioner, and was so understood a century ago in the case of Thomson, 4th February 1681, observed by Lord Stair. Here it is clear that Newlands meant to give his son no more than a liferent, but it is said that there must be a fee somewhere, and *quoad* the substantial part it is *in pendente*, but nothing in that. The *ususfructus formalis*, or fiduciary fee, is in the liferenter, and superior is not hurt. He has a vassal, and must get all casualties of superiority. It has been found that a fiar is not bound to enter with the superior during the life of the liferenter. Supposing this nominal or fiduciary fee in the father, it is a trust for the children, and if they were to serve heir to him, they could not be burdened with his debts. They could only be burdened to the extent of what they take; but here they could take nothing, as in fact before the service, the fee was in the children, and they would take nothing but a mere name from the father. I am for finding for Newlands' children."

LORD JUSTICE-CLERK MACQUEEN.—"I hold that a fee cannot be *in pendente* by the law of Scotland, either in heritable or moveable subjects. It is said, suppose a subject was abandoned, derelinqished, there would be no fee. I deny that. It remains with the person who abandons during his life, and is in his

NEWLANDS  
v.  
NEWLANDS'  
CREDITORS.  
1798.

NEWLANDS  
v.  
NEWLANDS'  
CREDITORS.  
1798.

*hæreditas jacens* after his death, and there it must remain till regularly taken up by heirs, or attached by creditors. No length of time can, by the law of Scotland, give a right by negative prescription, if not acquired by positive prescription. But that will not determine this case ; for there is another principle that must have effect, that where the intention of the maker of the deed appears, that must have effect ; but then every man must be presumed to know that in law a fee cannot be *in pendente*, and therefore where a conveyance by a father to a son in liferent, and children to be born in fee, no more is given to the children than a *spes successionis*, and the solid right of liferent and fee is in the father, who may spend and dilapidate the subject, and disappoint the children. But this is a different case. Here it is given to the son for his liferent use *allenary*, which makes this a mere trust in the father, and gives the son the fee, and the father a liferent, and no more. A father may make his son a trustee as well as a stranger. A trustee's debts cannot affect the trust-estate, no more can the son's debts here, where the estate is conveyed for his liferent use *allenary*. Therefore the creditors of Newlands cannot affect this estate, nor have they reason to complain, as if they had looked into their debtor's right they must have seen that he had nothing but a liferent. It is said, where is the fee after the father's death and during the son's life, before the son has children ? I have no difficulty in answering that. There was here a fiduciary or trust-fee in the son for behoof of children of the son, when they should exist. This is a mere trust, no more than a name, as fee cannot be *in pendente*, but the moment children of the son exist the fee is in them. Therefore, though I differ in some things from Lord Eskgrove, my conclusion as to this case is the same."

LORD SWINTON.—" I agree entirely with the opinions given. The liferenter is a trust *fiar* for behoof of the heir. The fee is in the liferenter *fictione juris*, that the superior may not want a vassal, but that a mere fiction, in which the heir is noways interested. Mr. Newlands has given the estate to his son, for his liferent use *allenary*, which is just saying that he meant his son was to have nothing to do with the fee. If he had said so expressly, could this Court have found the fee in the son



contrary to the father's will and intention, clearly expressed in the deed? He has in effect done the same, by declaring that the son is to have a liferent allenary, which, in other words, is saying that the fee is in the son's children. I am for striking these lands out of the sale."

NEWLANDS  
v.  
NEWLANDS'  
CREDITORS.  
1798.

LORD DREGHORN.—"This a *quæstio voluntatis*, and in all cases wills ought to have effect, if not *contra bonos mores*, or if not precluded by some express law. The word allenary has no weight with me. I could give the same decision, though that word were not in the deed, if I were satisfied that only a liferent was meant to be given. In so far as allenary explains the granter's meaning it may be of use, but no farther. I am of the opinions given."

LORD METHVEN.—"I am not inclined to impose restraints upon property, and I cannot give effect to intention contrary to what I understand to be the legal effect of deeds. I doubt if the word allenary can in this case prevent the fee from vesting in the son, and if vested it may be attached by the son's creditors."

LORD PRESIDENT CAMPBELL.—"I am clear that, by the law of Scotland, a fee cannot be *in pendente*. It must be in some person or other. I think the case of Frog was rightly decided. There the fee was found to be in Robert Frog, and it could be nowhere else. There are many different cases of liferent and fee. First, take the case of marriage-contracts to husband and wife, in conjunct fee and liferent, the fee cannot be in both, and cannot be in the children, perhaps none exist of the marriage. If the estate comes by the husband, or if by the wife, and given to the husband *nomine dotis*, it becomes the husband's, and the fee is in him, but otherwise where subjects come by the wife and are not given to the husband *nomine dotis*. There is another set of cases, where the granter makes a settlement in favour of children or heirs, reserving his liferent. They can only take as heirs of provision, and though they have a *spes successionis*, the person who has the liferent may disappoint it. There are other cases where the right or estate flows from a third party. Proprietors may dispose of their property as they please, but we must always construe intention agreeably to legal rules, and after the fullest consideration, I cannot see any

NEWLANDS  
v.  
NEWLANDS'  
CREDITORS.  
1798.

rule or line that can be drawn from the different words frequently used in deeds—for liferent, for liferent only, for liferent allenary, for liferent during all the days of his life. These, and all such, come to the same thing as if only the word liferent had been used. If, therefore, we were to give different judgments where one set of words or other is used, where, in fact, the meaning is the same, that would make the Court arbitrary. In short, if there is any restriction, it must be in the word liferent alone, as much as if allenary or only were added. The intention of the granter, when no other word but liferent is used, is that the liferenter should not have the power to spend or squander the subject; therefore in this case I concur with the opinions given, that the intention of the granter is clear for a liferent. But there is a point as to the effect of intention, which has not been argued, which has occurred to me, and I wish it to be considered. I will give effect to intention in questions among heirs, or where deeds are gratuitous, but in questions with creditors or purchasers, I must, as to heritable subjects, consider the principles of the feudal law, as well as the intention of the granter of the deed. ¶ Where the fee vests it may be attached by creditors, and their attachment must have effect, although it should defeat the will or intention of the granter. I admit that the person in whom the fee is, may be liable to an action of damages at the instance of the person for whom the fee was intended, but if creditors or purchasers have acquired a legal right, that cannot affect them. It is said that no substantial right was vested in the father as liferenter, more than when an estate conveyed to a stranger as a trustee. I doubt that. A liferenter has more in him than a stranger trustee. He can claim and vote as a freeholder: A stranger trustee cannot. The trustee has no right but a trust for certain purposes. The substantial right is in the heir or person for whom the trustee acts. He has the right of fee under the burden of the purposes for which the trust was created, and for executing which only the trustee was appointed. This is very different from a liferent right where the liferenter is temporary proprietor, and though the liferenter does wrong in contracting debts or burdening the subjects, contrary to the will of the granter. I doubt as to not giving these debts and burdens effect

in questions with creditors or purchasers. I therefore come back to this question, How far this fiduciary-fee, or trust-fee, or what you please to call it, can be sustained as an entail to the prejudice of creditors? and in this case I think that, as creditors have attached a fee confessedly in their debtor, they must be preferred, and this estate cannot be withdrawn from them by being struck out of this sale."

NEWLANDS  
v.  
NEWLANDS'  
CREDITORS.  
1798.

LORD HENDERLAND.—"As to moveables I concur with majority, but as to heritable rights I doubt, and am of the President's opinion. Here the fee in the debtor, and being vested it must have effect, and cannot be qualified by words—liferent, or liferent allenary, &c. If these words are to have effect, they should prevent a fee from vesting, but as they cannot prevent a fee from vesting, they cannot be admitted to qualify the right which creditors may attach, and in this case have attached, and must be preferred."

LORD JUSTICE-CLERK MACQUEEN.—"Some things now have been thrown out by the President, as to which I beg leave to say a few words. It is an inaccurate mode of speaking to consider a fiduciary fee and a real substantial fee as the same. In England all estates by marriage-contracts are settled by trustees. Some settlements in Scotland are executed in the same manner. If a fiduciary fee and substantial fee were the same, then the trustees in such marriage-settlements may spend these estates. In the present case there is a liferent and no more given, and I never understood that the debts of a liferenter could affect the estate. It is most dangerous to alter settled points upon which practitioners and the country in general have relied. It is universally understood that a liferenter cannot burden subjects. To find otherwise, would give many estates to creditors that were believed to be secure, by being conveyed by a father to his son in liferent allenary, and conveyed to the son's children in fee."

LORD PRESIDENT CAMPBELL.—"If I had thought it a settled point I would not have moved it, but I do not think it is settled."

The Creditors having reclaimed, the Court "Adhered."

JUDGMENT.  
July 9, 1794.

LORD JUSTICE-CLERK MACQUEEN.—"When the cause was

NEWLANDS  
v.  
NEWLANDS'  
CREDITORS.

1798.

OPINIONS.  
MS. Notes,  
Elphinstone's  
Session Papers.

formerly decided I gave my opinion, and the reasons for it, at length. I was then for the interlocutor, and I still am so, but I will not again go over former argument."

LORD PRESIDENT CAMPBELL.—"I cannot see that the word *allenary* makes any difference. The intention of the granter is equally clear, whether he says in *liferent*, or in *liferent allenary*; but intention can have no effect in feudal rights. Creditors are not bound to inquire into intention. All they have to examine is the legal import of their debtor's titles, and if they see an estate vested in him, the creditor is entitled to rely for his security on such estate, and to lay hold of it in payment of his debt, whatever be the intention of the party who gave the estate to the debtor; and I think that here Lieutenant Newlands' creditors were, from deeds, entitled to believe that their debtor had the fee in him; and whether it was intended as a fiduciary fee or not, if vested in the debtor, the creditor is entitled to attach it in payment of his debt. In the case of entails, unless guarded by irritant and resolute clauses, the intention of the maker can have no effect in questions with creditors. If I saw a fixed practice and understanding that a fee is not given by deeds such as that now under consideration, I would give way, but I cannot discover that to be the case. I am therefore for altering. When the cause was last before the Court, it was the general sense of the Court that, in this case, the fee was given away by the granter of the deed that gives rise to this question, and it was farther admitted that it could not be in heirs unborn; but it was argued that it was in the *liferenter*, but that it was a fiduciary fee. But for whom is this fiduciary fee held, but for the nearest heirs of the person to whom granted; and if so, I think in a question with creditors of this fiduciary *fiar*, the creditors are entitled to attach this strange right in payment of their onerous debts."

LORD POLKEMMET.—"Is it not competent to convey to trustees for behoof of others? if so, could that fiduciary right be attached?"

LORD PRESIDENT CAMPBELL.—"Certainly there may be a trust-settlement, but then, in such case, the fee is given away by the granter and vested in the trustees."

The Creditors having appealed to the House of Lords, "It was Ordered and Adjudged that the interlocutors appealed from be Affirmed."

NEWLANDS  
v.  
NEWLANDS'  
CREDITORS.

1798.

House of Lords.  
April 2<sup>d</sup>, 1798.

OPINIONS.

LORD CHANCELLOR LOUGHBOROUGH.—"When I had first occasion to consider this cause, upon the case of the appellants, and a very accurate written note of the opinions delivered by the Judges, I was very much impressed with the importance of the case, and entertained great doubts as to the grounds upon which the decision had been given. I therefore thought it proper that the hearing should be postponed until the judgment could be supported on the part of the respondent. A case has accordingly been put in for him, and the result of the argument which followed upon it has not been to remove the doubts, which the first consideration of the case had raised in my mind.

"To state this question as distinctly as it is capable of being stated, these propositions have been agreed on in the argument which has been maintained. If a conveyance is granted to a person in liferent, and thereafter to the heirs of his body in fee, then such person must of necessity be fiar. It is also an agreed principle recognised by the law of Scotland, that a fee cannot be *in pendente*, or in abeyance. But the distinction that has been contended for by the respondent is, that if words are used which go beyond a mere declaration of a liferent, if the word 'allenary' is added after the words 'in liferent, for his liferent use,' then a mere liferent takes place in regard to the first disponee, and the fee is to be, I cannot tell, according to the argument, distinctly, where. It is, by implication, a fee in the first taker, which gives him some species of interest, coupled with some species of trust for his children, when they come into existence.

"This distinction, which the counsel admitted could not be maintained in reasoning or on principle, does not add one distinct idea to the limitation; yet the Court of Session thought that such affect had very generally been understood to be given to that word; and particularly a very learned Judge, of great authority, who had commenced practice at a very early period of life, had declared, that such had been the understanding

NEWLANDS  
v.  
NEWLANDS'  
CREDITORS.  
1798.

ever since he remembered anything, and that individuals had acted upon this supposition ever since. It was also observed, that though such understanding could not be stated to have been come up to by any express decision upon this particular point, yet it had been a familiar idea upwards of a century ago, that there was such a difference as had been contended for in the present case. In a case reported by Lord Stair, in 1681, *Thomson v. Lawson*, this distinction was mentioned. I do not take it that it was there stated as the mere argument from the Bar; but I conceive that in this, as in other cases reported by Lord Stair, where a principle, adverse to the decision, was stated, it was an opinion thrown out by the Court.

“ These things considered, and that the judgment gives effect to the intention of the testator, which, in equity, ought always to be supported, as far as it can be done consistently with the rules of law; though I feel no conviction, though my mind incline to doubt exceedingly that the judgment proceeded on safe grounds; yet I have not courage to venture on a reversal, when I am told by a person of high authority, that the effect of such reversal would be to put numerous settlements, made even in the course of his own experience, in a situation in which they were not understood by the makers of them to stand. I would therefore have it understood, that this consideration alone restrains me, and I would wish that the Court would, in some future case proper for the purpose, reconsider the principle of their judgment in this case, which, in consequence of this high authority, I think it more safe, for the present, to let remain unaltered, in the hope that the question may afterwards come again before the Court to be maturely settled.”

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1. On the Session Papers in the case of *Newlands*, LORD PRESIDENT CAMPBELL has written,—  
“ One point to be considered is,

What is the nature and legal import of what is called a *fiduciary* or trust fee in the nominal life-renter, and what particular form

of words is necessary to constitute such a fee? If the words are to such a person in liferent, for his liferent use, and to the heirs of his body in fee;—Does this mean something different from the same words, with the addition of *allennarly*, or *only*, or *merely*, or any such expression adjoined to the words, liferent use? In arguing the case of *Frog*, Mr. Fergusson of Pitfour seems to have been at a loss about this, and gave it a go-bye by saying, ‘that the idea of a fiduciary fee in that settlement was an imagination, as it contained no restriction in words other than that of *liferent*, which meant *fee*. Trusts must be plainly expressed, and not left to be gathered from remote circumstances,’ &c. All this may be true, but it does not go directly to the point, nor explain with sufficient precision how the line is to be drawn between one form of expression and another. The case of *Forbes v. Forbes*, observed by Lord Kames, goes nearer to the point, and seems pretty plainly to establish that there may be cases where the word *allennarly* ought not to be considered as making any difference one way or other. In the case of *Frog*, it was ultimately found that there was a fee in Robert *Frog*, and that his onerous debts and deeds were effectual to carry that fee. Yet he was *ex figura verborum* no more than a liferenter, and the fee was nominally in the heirs to be procreated of his body, whom failing, &c. But the Court thought that the fee could not be in heirs

unborn and uncertain. It was, on the one hand, given away from the granter, and, on the other hand, could not be in future heirs. It could rest nowhere but in Robert *Frog*. The question was well considered and solemnly determined, and ought for ever to be at rest.

2. “But two inferences have been raised upon that decision, neither of which are founded on the express terms of it, and both of which are attended with difficulty. *First*, It is supposed on one side of the argument, that the fee in such a case, where we have no other words of restriction except liferent and fee, is equally absolute and equally unlimited in the person of the institute, as if he had been called to the fee in express terms, without any mention of liferent, insomuch that even his gratuitous deeds of settlement must be effectual to carry it away. *Second*, On the other side it is maintained, that if to the word liferent we add a few superfluous terms of the same import, such as the word *only*, the word *merely*, the word *allennarly*, though we neither add to nor take away a syllable from the subsequent clause of fee, we produce so wonderful a change, that instead of a pure and unqualified fee in the person of the institute, subject even to gratuitous deeds, we divest him of every right, title, or interest, except that of a bare usufruct, and exclude his most *onerous* creditors or disponees from any access to attach the subject. This is the more extraordinary, as we still

leave a *fee* in him, *i.e.*, we leave the estate in him. But to reconcile this inconsistency we call it a fiduciary fee, meaning to assimilate it, by the use of this word, to the case of an estate conveyed to a stranger for certain ends and purposes, and where it is certain that no more than a trust-estate vests, but where it is equally certain that there is a co-existing substantial fee which can no more be *in pendente* than a trust fee, but must rest somewhere, as indeed all property must; for, independent of feudal ideas, it is a contradiction in terms to suppose property without a proprietor. An estate descending from the ancestor to the heir, or conveyed by family settlements, can never be a *res nullius*, for by the law of Scotland, if it can find no other owner, it will belong to the king.

3. "The Court, in the case of Frog, having found the fee to be in Robert Frog, and not in the heirs unborn, it was a necessary consequence that his onerous debts and deeds were found also to attach upon it. But the Court had no occasion to decide in a question with *heirs*, whether the restricting words, short and simple as they were, did or did not lay him under an obligation in their favour. Had his grandmother given him expressly the fee, but only said, 'I mean that failing you it shall go to the other heirs and persons named in the deed, and I desire that you shall not defeat their hope of succession;' even this, though a weaker expression of her intention, would

have barred him from altering gratuitously. She did the same thing more emphatically, by restricting him in words to a *liferent*, which was the strongest possible signification of a will that he should not dilapidate or defeat, but allow the succession to take place as devised by her. But the Court justly thought that no such form of expression could bar onerous creditors or purchasers from attaching the fee in his person. Suppose then she had added to the word *liferent* a few of those anxious synonymes above noticed, would this have made his right, or that of the subsequent heirs, or of any one concerned, either stronger or weaker? It is thought not. In the case of Newlands we have different modes of speech used in the two different gifts, which, however, both parties seem to think, and with reason, mean one and the same thing. But let the form of words be what it will, if the fee be in the institute heir, or first person called in the settlement, or in any other person called after him, the onerous debts and deeds of that person must attach upon the subject; although it may be very true that, by contracting such debts and doing such deeds, he counteracts the will of the granter, and an action may lie against him to purge encumbrances, or to pay damages, &c., for his contravention, as in the case of an entail which is defective in one or other of its clauses, or left out in the investitures, or not recorded in the Register of Tailzies. The case of a clause of return, is another



instance of a fee subject to limitation as to the right of succession, which may be effectual *quoad* gratuitous deeds, though not *quoad* onerous.

4. "The words 'liferent allanarly' are not *verba signata*, which by their own force and effect exclude the vesting of the fee. It is admitted that the fee vests, but they are strong and anxious expressions of will, which are entitled to every effect and operation that *will* can have in such a case; but the effect of will to qualify a fee in an institute or substitute-heir, has already been exemplified. It is said he was a fiduciary *fiar*. This is a term which has been invented to obviate a difficulty, but it just leaves the matter where it was: and for whom is he fiduciary? for himself in liferent, and the heirs of his body in fee, *i.e.*, for himself in fee. A fiduciary fee implies a substantial fee. Where then is the substantial fee? Is it in heirs unborn, and who never may exist, and failing them, in the king? Such a proposition cannot be maintained. The substantial fee in the case of such a settlement is and must be in the fiduciary *fiar*, because it can exist nowhere else. There are cases of nominal fees which are destined from the actual or substantial fee; *e.g.*, if I have sold my estate and granted a disposition with procuratory and precept, and the purchaser is infeft upon the precept, but has not yet taken the necessary steps to make his base-infeftment public, I still have in me a naked nominal fee

in consequence of the anterior feudal investiture in my person, but which will vanish as soon as complete feudal titles are made up in the new proprietor, and in the meantime the substantial fee is in him. In like manner, if I dispoise my estate, in trust, to a stranger, for ends and purposes, *e.g.*, to pay my debts, or to raise a fund for family provisions, &c., and the trustee is infeft, here are distinct fees,—the trust fee is in him till the ends of it are accomplished, but the substantial fee remains with myself, and from me will descend to my heirs. If I am a freeholder, I will continue to vote in right of my substantial fee. My heir-apparent, after my death, will do the same, as happened in the case of Sir Alexander Campbell of Ardkinlass. The trustee in that, or in any case of the kind, has no right to the estate, directly or indirectly, except what the trust gives him. He cannot vote as a freeholder, he cannot bring a shilling of his own debt upon it. The estate is not his but mine. He is a mere name for me, and for my creditors, &c., in terms of the trust. Yet the fee in him is far from being nominal in the sense of the preceding case, neither is it a liferent allanarly. It is an actual fee, but it is consistent with the substantial fee being in the truster or the heirs of the truster. In the very case of Newlands we have a trust of this kind, which, by the settlement, was to last a certain number of years. Now, for whom did these trustees hold the sub-

stantial fee of the subjects in question? They held it for the heirs in the settlement, *i.e.*, for the grantor's son, who is called the fiduciary fiar, and for the heirs of his body, &c., *ergo*, the trust fee was held for this fiduciary fiar and the heirs of his body; and why were the trustees only to hold it till his age of twenty-one, and then to denude in his favour, if they were to give him nothing? This is a strange jumble, if we hold this fiduciary fiar to be neither more nor less than another trust-fiar, holding the fee again in trust; the difference was, that these first trustees did not hold the estate for themselves at all, but young Newlands holds it for himself in the first instance, and perhaps there neither does, nor ever will, exist another person for whom he will hold it, the king excepted. If the subjects were sufficient for a freehold qualification, would he not be entitled to be enrolled and to vote? Who is entitled to hinder him? If he had only a trust fee in the proper sense, or a merely nominal fee, or a liferent of no fee, which exists in any person, it is thought this would be a very new sort of qualification. But it is admitted that the liferent which he has in words is a liferent upon a fee which is in himself, and therefore he would claim to be enrolled in virtue of his own fee, or the liferent of his own fee, and if this be not a substantial fee, it would not be a good title; but it is enough to say, that if he has not the substantial fee there is no other person existing

who can have it. Besides, the argument on the other side would be establishing a new kind of tailed fee not yet acknowledged in the law of Scotland. A trust in a man's person for the heirs of his own body, who may never exist, cannot in its nature receive execution. If a trust or fiduciary fee may take place in the first institute, the same form may go through all the substitutes, and, accordingly, in the case of Thomson, we have various substitutes, all in the same terms. Every heir may be declared a fiduciary fiar or a liferenter *allienarily* for the succeeding heirs. If this alone be sufficient to qualify the right, what use is there for the Act 1686, and for clauses prohibitory, &c.? We at once introduce the Statute *de donis conditionalibus* into the law of Scotland, and the Record of Tailzies becomes useless. The case of M'Nair was an alarming example. The Court, 28th June 1791, refused in *hoc statu* to reduce it at the instance of the institute heir himself; but if ever it comes back in a question with a creditor, it will deserve the most serious attention. With respect to legacies and personal provisions there is much less difficulty, because we have no feudal rules nor security of records to stand in the way of giving full effect to the will of the grantor. The chief thing to be attended to there is to avoid nice and subtle distinctions as much as possible, and to give as little room to arbitrary decision in construing the deed upon which the question arises.

5. "In all cases where the granter provides for his own issue or heirs, whatever form of words he uses, it ought to be understood that he does not mean to divest himself of the fee and put it in them, but that they must take as representing him, or as heirs of provision to him, subject to his debts and deeds, though if it be a provision by contract of marriage, the children will also be *quodammodo* creditors to the effect of setting aside gratuitous deeds, and perhaps of competing with other creditors. See Dictionary, *voce* Provision, 14th January 1766; Campbell *v.* McNeill, 18th November 1784; Cameron, 3d June 1784; Gordon of Ardoch. Where the provision or bequest comes from a third party, *e.g.*, from a father or other relation to A B in liferent, and the heirs of his body in fee, or to A B in liferent *allenary*, or any

such form of words, no gratuitous deed of A B ought to interfere with the plain intention of the granter, that the succession shall take place in the manner devised by him, and it is idle to talk of a distinction between one form of words and another. '*Liferent allenary*' owed its introduction to the case of conjunct fee and liferent; for it is natural there to use the expression to A B and his wife in conjunct fee and liferent, for her liferent use *allenary*, which is no more than saying, although I give her in words a conjunct fee, I mean truly to restrict her to a liferent only. This is all that is meant in the case of Thomson *v.* Lawson, 4th February 1681, observed by Lord Stair, and all that Mr. Fergusson of Pitfour meant in his argument in the case of Frog."—*MS. Notes, Sir Ilay Campbell's Session Papers.*

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II.—ALLARDICE *v.* ALLARDICE.

David Allardice conveyed his estate "to and in favours of Robert Allardice, my eldest son, in liferent, during all the days of his lifetime, for his liferent use *allenary*, and to the heirs-male or female lawfully to be procreated of the body of the said Robert Allardice, in any marriage he shall *hereafter* enter into, in fee; which failing, to David Allardice, my second son, in liferent, during all the days of his lifetime, for his liferent use *allenary*, and to the heirs-male or female, lawfully procreated or to be procreated of the body of the said David Allardice, my second son, in fee; which failing, to my own nearest heirs or assignees whatsoever, in fee."

March 5, 1795.  
NARRATIVE.

ALLARDICE  
v.  
ALLARDICE.  
1795.

The eldest son having survived his father, took infeftment on this conveyance. Afterwards, with a view of altering the destination, he obtained a precept of *clare constat* from the superior for infefting himself in the lands as nearest and lawful heir to his father. He then executed a disposition of the estate in favour of himself and the heirs-male or female of any marriage he should thereafter enter into ; “ which failing, to Jean Allardice, lawful daughter and only child procreated betwixt him and the deceased Elizabeth Murray, his wife, and the heirs-male or female to be lawfully procreated of her body ; which failing, to David Allardice, his immediate younger brother, in liferent, during all the days of his life, for his liferent use allenary, and to David Allardice, his son, in fee.”

The difference between the disposition by the father, and that by Robert the son, was, that by the former Robert's daughter by his first marriage was purposely excluded, while, by the conveyance executed by her father, the lands were conveyed to her in preference to her uncle David, in liferent, and his son, in fee.

An action of reduction and declarator was brought by David and his son.

ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—The principle established in the case of Newlands is not applicable to the present. In that case the destination was to John Newlands, in liferent, for his liferent use allenary, and to his children *nascituri* in fee. He was thus fiduciary fiar for persons who, as soon as they existed, became the real fiars. But in the present case Robert Allardice, failing issue by any future marriage, was fiar for his brother David, who was himself only a liferenter. But a fiduciary fiar for a liferenter is an absurdity. If, too, David is to be held as fiduciary fiar for his children, then Robert was fiduciary fiar for another fiduciary fiar, who was fiduciary fiar for the real fiars. If this form of conveyancing is to be sanctioned, then a new and extraordinary species of entail will be sanctioned, containing none of the clauses directed by the Act 1685.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—According to the principles

established in the case of Newlands, it is clear that the fee, if it rested in Robert Allardice at all, was in his person fiduciary only, and was held by him for behoof of the pursuers, to whom the estate was ultimately destined. It is in vain for the defender to argue that a succession of liferents is contrary to the principles of the common law, and if admitted, would tend to establish a new species of entail. These arguments were formerly urged in the cases of Newlands and Thomson, and were disregarded by the Court. If it is once admitted that a fiduciary fee ought to be sustained for the equitable purpose of preventing the intention from being defeated, there seems no reason why such a fee may not be created for the behoof of one set of heirs as well as of another. If Robert Allardice held the estate in trust for his own children by any future marriage, he held it equally in trust for the pursuer, to whom, failing such children, it was destined by his father. Neither does it make any difference that the right of one of the pursuers was restricted to a liferent only, seeing that there is nothing in law to prevent the creation of different liferents to succeed each other in the same estates.

ALLARDICE  
v.  
ALLARDICE.  
1795.

The Court "Sustained the reasons of reduction, and decerned in the reduction and declarator."

JUDGMENT.  
March 5, 1795.

LORD ESKGROVE.—"Were this the same with the case of Newlands, it would be necessary to go into a discussion of the point lately before us; if it be not, we must discover the difference. There was here a title, made up by a precept of *clare constat*, but that is of no consequence, as Robert, the son, accepted the deed executed by his father; and, had he possessed a power of rejecting his father's settlement, he would have been barred; but, in fact, he possessed no such power. In Newlands' case, the fee was given to heirs *nascituri*; and here, failing the heirs of the body of the first son, the liferent is given to the second son, and the fee, to the heirs of his body. I remember in Newlands' case, it was said, that to support such deeds, would be to authorize a series of liferents, and introduce a new way of making an entail. Here we have an instance of it. But you did not think that a sufficient ground for setting

OPINIONS.  
Bell's Cases.

ALLARDICE  
v.  
ALLARDICE.  
1795.

aside the deed ; you found, that, according to the principles of our law, there must be a fee somewhere ; and that the fee in the liferenter must be fiduciary ; and I do not see how I can refuse my assent to the rule in this case also. There is no liferent given to any not named ; and although there be a succession of liferenters, yet, if you find that there can be one liferenter possessed of this fiduciary right, I see no difference betwixt that case and the present. There is no irrationality here ; and the only doubt is from the fiduciary fee being held, not for himself, but for his brother, and his brother's children. Yet, if the decision in the case of Newlands be right, I do not find myself at liberty to go against it here."

LORD JUSTICE-CLERK MACQUEEN.—" I own I did not see a question in this case. The only difference betwixt it and Newlands is, that there is here a succession of liferenters, but there is nothing in that."

LORD PRESIDENT CAMPBELL.—" This differs from the case of Newlands in this respect, that the question here is with heirs ; whereas in that case, the question arose amongst creditors. In all questions with heirs or gratuitous claimants, the destination must be strictly adhered to ; and even had this question occurred with creditors, I should have been of the opinion expressed in Newlands' case ; at the same time, I am much alarmed at this succession of trusts. The next step will be, to give the estate to the eldest son in liferent allenary ; whom failing, to the heirs of his body in liferent allenary ; and so on through all the heirs of a destination ; and I am afraid there are principles in the decisions which we have pronounced that would support such a destination. But when the case occurs, we shall judge of it."

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1. In the case of THOMSON v. LAWSON, February 4, 1681, reported by LORD STAIR, Robert Mastertoun conveyed " to his son James, and his spouse, and longest liver of them two, in liferent, and to the heirs of their marriage ; which failing, to Alison, Jean, and Margaret Thomson, his oyes by his daughter." Infertment was taken

both for his son and his spouse and the three grandchildren. In a competition for the rents between the three grandchildren and a party holding a liferent right from James Mastertoun, the grandchildren PLEADED,—If the disposition had been to James Mastertoun and his spouse, in conjunct fee, the husband behoved to be fiar, but here it is only to him in liferent, which can import no fee. The liferenter PLEADED,—In the common style of notaries, conjunct fee and liferent are equivalent terms, unless it bear liferent alienably; but the disposition being to James and his wife, and the heirs between them, doth necessarily import that they were in conjunct fee and the husband fiar, for their children could never be fiars to naked liferenters, and seeing James was fiar, his heirs of tailzie cannot quarrel his deed. The Lords Found, “That by the conception of the disposition, James Mastertoun was fiar, and therefore preferred the liferenter deriving right from him.”

2. In the case of *GERRAN v. ALEXANDER*, June 14, 1781, a bequest was left “to Catherine Gerran, in liferent, alimentary, and to be divided by her among her children, at any time before her death, and failing of her dividing the above sum, to be divided by the heirs and representatives of the testator as they shall think proper.” The question being raised, how far the mother could affect the legacy, the Court found unanimously that she had only a right of liferent.

In the Faculty Report it is stated, “Lord Braxfield observed, that by many decisions it had been found that the fee was really in the parents, though the destination bore only in liferent to them, and in fee to their children, but that this was not *ex necessitate*, as it had sometimes been supposed, lest the fee should be *in pendente*. It was upon the presumed will of the granter, who only meant a *spes successionis* to be in the children, and therefore whenever there appeared to be intended a right of property in the children, the parents’ right was either limited to a mere liferent, or considered as a trust-fee which could not be defeated.”

3. The case of *THOMSON v. THOMSON*, July 9, 1794, referred to by the pursuer in the case of *Allardice*, was decided at the same time as that of *Newlands*. The terms of the conveyance were “to the pursuer in liferent, for his liferent use only, and the heirs of his body in fee; whom failing, to the defenders, for their liferent use only, and to their children in fee.” The Court found that the pursuer was a liferenter only. The pursuer having appealed to the House of Lords a considerable time after the appeal in the case of *Newlands*, the judgment was affirmed, December 14, 1812. Another case had in the meantime been decided by the Court in conformity with the case of *Newlands*.

4. In the case of *WATHERSTON v. RENTON*, Nov. 25, 1801, the conveyance was to a wife and her

husband in conjunct fee and liferent, and to the longest liver, for their liferent use allennarly, and to the children procreate, or to be procreated of the marriage, equally in fee. Doubts having arisen with respect to the interpretation of the deed, whether it conveyed to the immediate disponees an absolute or a fiduciary fee, an action of declarator was brought at their instance, in which their children were called as defenders, to have it found that the parents had the power to sell or dispose of the lands, either for onerous or gratuitous causes. Lord Meadowbank, Ordinary, reported the cause, when the Court were clearly of opinion that the point was already fixed, and that after the decision of the House of Lords in the case of *Newlands*, they were not at liberty to decern in terms of the conclusions of the declarator. They accordingly found that there was only a fiduciary fee in the pursuers.

5. In the case of *HARVEY v. DONALD*, May 26, 1815, Mrs. Innes conveyed her whole heritable subjects to her five sons and three daughters, *nominatim*, and to any other child who might be procreated of the marriage existing at her decease, "equally and proportionally among my said whole children, share and share alike, and to the heirs lawfully to be procreated of their bodies respectively, but to my said daughters in liferent, for their respective liferent uses allennarly, and to their heirs lawfully to be procreated of their bodies respectively in fee."

The deed farther provided, that in case of the decease of any of the daughters without issue of their bodies, their shares should belong "to my said sons, equally and proportionally, and to the heirs of their bodies respectively, and to the last survivor of my said sons solely, and his heirs and assignees whatsoever; and failing all my said children without heirs of their bodies, and lawfully disposing of their share, then to my own nearest heirs and assignees, heritably and irredeemably." The eldest daughter having married Mr. Donald, she conveyed to him, his heirs, executors, or assignees whatsoever, all lands and heritages pertaining and belonging to her as one of the disponees of her deceased mother, in virtue of the disposition and settlement executed by her in favour of her children. The husband having died without issue, his executor insisted that, as the wife's brothers were now dead, he was entitled to the fee of the property to which the wife had succeeded under her mother's disposition, and PLEADED,—Although ever since the decision of *Newlands*, a conveyance of liferent for liferent use allennarly gives nothing more than the liferent use of the subjects, yet there is still a fee created, which, although not absolute in its nature, but fiduciary for behoof of the persons described as heirs, vests in the liferenter a legal and subsisting right and interest, defeasible only by certain contingent events. Accordingly the wife was so far a real fiar in virtue of the convey-



ance of the fiduciary fee, as to have a right of disposal, if the contingencies creating the limitation did not happen. But this defeasible right has not been defeated, for there exists no issue of the marriage, and her brothers, who were the substitutes in her mother's disposition, are dead. Since, therefore, in the event of failure of children of the marriage, and the death of the brothers, the right vests in the heirs and assignees of Mrs. Innes, only if not disposed or assigned by Mrs. Donald, and as the right has been conveyed by Mrs. Donald to her husband, the pursuer, as his representative and executor, is entitled to take it up. The pursuer's right, therefore, is not limited merely to the life rent right, but comprehends the fiduciary fee at the date of the marriage, constituting a substantial reversionary interest which, now purified and free from those contingencies that might have limited the right, amounts to an unqualified fee.

6. The defender PLEADED,—The vesting of a fiduciary fee is a mere legal fiction, introduced in consequence of the evident absurdity of allowing an abstract principle of law to control the direct and explicit words of a disposer. There is nothing independent of the life rent, which the defender could convey either onerously or gratuitously. The question as to the

real situation of the fee seems to be one of pure curiosity. But the defender had, under her mother's deed, no power of disposing and assigning the fee. Her brothers were substitutes, and could validly have transferred to any person their *spes successionis*. She certainly could take up the property as assignee to her last surviving brother, but never as fiduciary fiar under the life rent conveyance. But this right, derived from her brother, was not conveyed by the marriage-contract, which relates merely to rights pertaining and belonging to her by her mother's settlement. LORD ALLOWAY, Ordinary, "Sustained the defences." The pursuer having reclaimed, the Court "Adhered." LORD HERMAND observed,—“The case of Newlands is the *regula regulans* in this case. It never has been shaken, and I hope never will. We cannot go into the niceties and subtleties of the doctrine of fiduciary fees. At the best, there was only created a bare trust in the defender.” LORD SUCCOTH observed,—“The distinction contended for at the bar—that, in the case of Newlands, there was a child alive; whereas here there had been no child of the marriage, deserved no attention. The case of Newlands was decided, not on such narrow and confined views, but on broad and general principles.”

*Where a father being infest, conveys to himself in liferent, for his liferent use allenary, and to his children in fee, and upon this conveyance takes infestment in liferent only, and in the instrument of sasine no mention is made of the children in fee, the lands remain attachable by the father's creditors.*

I.—FALCONER v. WRIGHT.

**JAN. 22, 1824.** ROBERT M'ARTHUR, while heir-apparent to certain lands, conveyed them by his marriage-contract "to himself in liferent, for his liferent use allenary, and the children and bairns of the marriage equally amongst them, in fee, whom failing, to his own nearest heirs and assignees whomsoever."

**NARRATIVE.**

He reserved to himself power to convey the whole lands to the eldest son of the marriage, or to divide them among the children of the marriage in such proportions as he might think proper. He further reserved to himself power, "notwithstanding the terms of the foresaid destination, with consent of his promised spouse, to sell and dispose of the foresaid lands, or any part or portion thereof."

He afterwards made up titles as heir of his father, and was infest in the lands, and thereafter he again took infestment upon the precept in the contract of marriage, "for his liferent use allenary;" but the instrument of sasine contained no mention of the children or of the fee of the lands.

In 1821, his wife being then dead, he conveyed the lands to trustees, for behoof of his creditors, and upon this conveyance infestment followed in favour of the trustees. The trustees then raised an action of reduction and declarator against the daughter of the truster, who was the only child of the marriage. In this action they sought to have it found, that by the contract of marriage a *spes successionis* only was intended for the children of the marriage, and that the pursuers, in virtue of the trust in their favour, had the only good and undoubted title to the lands thereby conveyed, and were entitled to sell and dispose thereof, for the purposes mentioned in the trust-disposition, and that the defender, the only child and heir of the marriage, had no right or title to the lands.

PLEADED FOR THE HEIR OF THE MARRIAGE.—By the marriage-contract, and infeftment following thereon, the father's interest in the fee was made fiduciary. It is not contended that he was divested of the fee in the lands, by the conveyance to himself in liferent allenary, but that he held a limited fee only. In virtue of that limited fee he had no power of alienation, nor so long as any child of the marriage existed, had he any right which his creditors could attach, beyond a liferent allenary.

FALCONER  
v.  
WRIGHT.  
1824.  
ARGUMENT FOR  
HEIR OF THE  
MARRIAGE.

An infeftment in favour of a party in liferent, for his liferent use allenary, and to certain heirs in fee, is to all intents and purposes the same as an infeftment to the same party in liferent and in trust for the same heirs until his death. The words "liferent allenary," express the will of the disposer just as clearly as if he had said in trust. These words intimate to all the world that his right is limited, and that he has no more power to sell the lands or to affect them with debt, than if he was expressly declared a trustee. It is of no consequence, therefore, that, independently of this limited right, the party happens at the same time to stand infeft upon titles which are unlimited. His unlimited infeftment becomes qualified by all his acts and deeds, made real, according to law. If, therefore, the constitution of a liferent allenary is equivalent to the execution of a trust, and has been made real by infeftment, this limitation must stand against the party, and must qualify his unlimited infeftment until it is wiped off the record by a discharge from the parties in whose favour the trust was constituted.

The objection that the children were not infeft, is without weight. It is impossible, with any contrivance, to infeft children not begotten. If the Bailie had delivered the symbols of infeftment to the husband, for himself in liferent allenary, and to his children in fee, *nascituri*, he would have gone beyond the terms of the precept, and such an infeftment would have been erroneous. The precept was to infeft the father in liferent, for his liferent use allenary, and the Bailie had no authority to give himself infeftment in any other character whatever. His office is purely ministerial, and his duty is to give infeftment in terms of the precept, so far as that is demanded, and in so far as that is possible. It is ludicrous to speak of infefting

FALCONEB  
v.  
WRIGHT.  
1824.

a child *nasciturus*. No form of words which the Bailie could have used in favour of such a contingent creature will ever make an infeftment in his favour, and, consequently, no infeftment which it is possible to give can ever divest the granter. Even if the words "to the children in fee" had been inserted, they would have no meaning or legal effect, and matters would have stood exactly as they do now. If therefore the infeftment in question is not a valid one in favour of the children of the marriage, it is impossible to give a valid infeftment upon any contract of marriage.

ARGUMENT FOR  
CREDITORS.

PLEADED FOR THE CREDITORS.—The truster having been infeft as heir of his father, his right as appearing on the records was that of absolute proprietor. All the world were therefore entitled to contract with him, without regard to any personal contracts or obligations not made real by infeftment. The right given to the children by the marriage-contract remained personal. It cannot therefore compete with the real right vested in the pursuers. It was only an infeftment following upon the marriage-contract in favour of the children which could give them any real right to the estate. As however no infeftment was taken in favour of the children, the personal obligation in their favour must go for nothing in any question with creditors regularly infeft in the estate of a person who, according to the public records, stands vested with the absolute and unqualified right of property.

It is argued, that when infeftment was taken upon the contract of marriage, no sasine could be given as to the fee, in respect that there was no child then in existence. But even before any child existed, infeftment might have been taken in the express terms of the dispositive clause in the contract. Such an infeftment would have made the right real, whatever the true nature of the right might be which was provided for the children by the contract. It might have not directly vested a fee in the children, but it would have vested a fiduciary fee in the father for their behoof, that being the legal interpretation of such clauses in marriage-contracts. It would have made that right real, which, when allowed to rest on the contract, was merely personal.

It is contended that, in the case of Newlands, the infeftment taken in favour of John Newlands was also silent as to the fee of the lands, and yet he was held to be a mere liferenter. But the difference between that case and the present is, that he had no title to the lands in dispute, other than the disposition from his father, and the relative gift from Exchequer, on which his infeftment proceeded, whereas in the present case the truster had a title separate and distinct from the marriage-contract. He had the title made up by him as heir to his father, which vested him with an absolute right of property in the lands. Nothing was vested in the person of John Newlands except a bare liferent. His creditors, therefore, could never sell the lands as belonging to him in fee. The truster, however, as in the present case, had an absolute title of property, independently altogether of the marriage-contract. The only question to be determined is, Whether that property was taken out of him by an infeftment of the fee in favour of any other party? But the instrument of sasine in the present case shews that no infeftment was given of the fee, or any mention at all made of the fee in the delivery of the sasine. It is clear, therefore, that the fee remained in the truster in virtue of his infeftment, as heir of his father, and that infeftment being unlimited, the fee was attachable by his creditors, and has been validly conveyed by him to the pursuers.

FALCONER  
v.  
WRIGHT.  

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1824.

LORD MACKENZIE, Ordinary, Found " That Robert M'Arthur acquired by succession right to the lands of Balquhapple and others ; which right has since been completed in his person by infeftment : Finds, therefore, that the said lands must be carried by his disposition to the pursuers in trust for his creditors, and infeftment thereon, unless it should appear that he was divested of the said right before the date of that trust-disposition, or of the infeftment thereon : Finds it alleged by the defenders, that he was so divested by the marriage-contract between him and Margaret Moncrieff, his wife, and the disposition contained in that contract and infeftment taken thereupon, which it is said left in him the liferent of the said lands only, and conveyed the fee thereof to the children of the said marriage ; but finds, that the sasine taken upon the said contract

FALCONER  
v.  
WRIGHT.  
1824.

and disposition is so expressed that it cannot have the effect of conveying the fee of the said lands out of the said Robert M'Arthur, or even changing it into a fiduciary fee in his person: Therefore finds, that the property of the said lands was validly conveyed to the pursuers, and is disposable by them, in terms of the trust-disposition in their favour: Finds, that there is no occasion for reduction of the marriage-contract, or infeftment thereon, to the effect of clearing the pursuer's title to the lands, or to take away any pretence of right in the defender, Johanna M'Arthur, affecting the same, and finds no conclusions in the libel for reduction of it to any other effect: Finds no expenses due to either party, and decerns and declares accordingly."

In a Note his Lordship observed,—“ It seems to the Lord Ordinary, that there have been two views of the case of Newlands, (1.) That the lands were vested in the husband in fiduciary fee for the children *nascituri*; (2.) That they remained in the disponent. In the first view, the sasine seems insufficient to vest the fiduciary fee expressly delivering the lands in life-rent only, and nothing more. In the second view, Robert M'Arthur was himself the disponent, and so the lands remained his, and consequently subject to his debts.”

JUDGMENT.  
Jan. 22, 1824.

The defender having reclaimed, the Court “ Adhered.”

OPINIONS.

In the report of the case by Mr. Shaw, it is stated, “ All the Judges were of opinion, that the intention to provide the fee to the children was clear; but a majority held that this had not been validly executed,—that this case was different from that of Newlands, because M'Arthur had an unqualified title, independent of that created by the contract of marriage, whereas Newlands had only one title, in which his right was expressly limited.” “ Lord Gillies was the dissenting Judge. He rested mainly on the ground that he considered the case of Newlands directly applicable.”

The defender having again reclaimed, the reclaiming petition was refused without answers. .

## II.—HOULDITCH v. SPALDING.

John Spalding being infeft absolutely in the estate of Home, conveyed these lands, in terms of an obligation and his contract of marriage, “to himself in liferent, during all the years and days of his life, for his liferent use only, and thereafter, if there shall be issue-male of the said marriage, during all the years and days of his life, so long as such issue-male shall be in existence, and after his death, to and in favour of any son or sons whom he might have by his present marriage, in the order of succession established by law, and the heirs whatsoever of their bodies.”

NARRATIVE.

June 9, 1847.

The precept authorized sasine to be given to Mr. Spalding “in liferent, during all the days and years of his life, for his liferent use only, as aforesaid, and after his death, to any son or sons whom he might have by his present marriage, and the heirs whatsoever of their bodies.” In virtue of this precept, sasine was given to Mr. Spalding “in liferent, during all the days and years of his life, for his liferent use only, as aforesaid.” The instrument of sasine made no mention of the fee.

A creditor of Mr. Spalding raised a summons of adjudication of the said lands. To this action defences were lodged for the eldest son, and for the father himself, as trustee or fiduciary fiar for the eldest son.

PLEADED FOR THE PURSUERS.—Under the old investiture Mr. Spalding was vested in the fee, and that fee was never taken out of him in favour of any other party. The destination to the father in liferent, for his liferent use allenary, and to his children *nascituris* in fee, gave the children a personal right to the fee. As, however, a disposition to the liferent merely would carry nothing to the disponee but a right of liferent, leaving the fee in the disponer, and as it was by the conveyance to the children unborn or unnamed in fee that it had been, *ex necessitate juris*, held to vest in the parent fiduciary, so it was necessary to pass infeftment in the same terms, in order to feudalize the fee in the parent, whether absolutely or in trust. In the present case, the infeftment was only to the father in liferent allenary, instead of being to the father in

ARGUMENT FOR  
PURSUERS.

HOULDITCH  
v.  
SPALDING.  
1847.

liferent allenary, and to the children in fee ; and sasine not having been given in these latter terms, there was no real fee vested in the trustee for the children. The real fee still rested with the father absolutely, and could be attached by his creditors.

ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—Under the conveyance by his father, in terms of his contract of marriage, the fee of the lands belonged to the defender, who was the eldest son of the marriage. The defender's right was strictly limited to a liferent interest. Any adjudication, therefore, which a creditor of the father might lead, could attach that liferent interest only, that being all the interest which the defender had in the lands.

LORD ROBERTSON pronounced the following interlocutor:—  
“ In respect the instrument of sasine in favour of John Eden Spalding bears to be ‘ to the said John Eden Spalding in liferent, during all the days and years of his life, for his liferent use only, as aforesaid ;’ and does not bear, in terms of the precept, to be also ‘ after his death to any son or sons whom he may have by his said present marriage, and the heirs whatsoever of their bodies ; whom failing, to such person or persons as he shall nominate and appoint by any instrument in writing duly executed by him at any time of his life, and even on death-bed ; and failing such nomination, then to his own nearest heirs and assignees :’ Finds, that whatever may be the import of the disposition whereon the said infestment proceeded, as conveying a fiduciary fee to the said John Eden Spalding, for behoof of his son or sons *nascituris*, and other substitutes, the infestment taken for his liferent use only, cannot be held as having the effect of conveying the fee of the said lands out of the said John Eden Spalding, or changing it into a fiduciary fee in his person ; and, therefore, and in conformity with the decision in the case of *Falconer v. Wright*, 22d January 1834, repels the defences : Finds that the fee of the said estate not having been effectually vested in the said John Eden Spalding as a fiduciary fiar, or to any effect under the disposition of 22d May 1834 by him, in his own favour, for his liferent use only, and after his death to his son or sons, and other substitutes, as aforesaid, and on which an infestment of liferent, for his liferent



use only, and nothing further, followed ; the fee of the estate stands vested in him in virtue of the prior investiture in his favour, in which investiture he was absolute fiar, and is liable to be adjudged for his debts ; and therefore finds, adjudges, decerns, and declares, in terms of the conclusions of the libel."

HOULDITCH  
v.  
SPALDING.  
1847.

The defenders having reclaimed, the Court " Adhered."

JUDGMENT.  
June 9, 1847.

LORD JEFFREY.—" When once it has been held, that under conveyances to parents in liferent allenary, and children in fee, you can give infestment in precise terms of the destination, then I cannot hesitate in saying, that when you stop short, and only give infestment in the liferent, the fee by such infestment passes to no one, but remains upon the old investiture. It is in vain to apply metaphysics to a settled rule of law like this. Perhaps, if the matter were open, the rationalistic views of the present day would not sanction the subtleties of our older lawyers ; but these subtleties have long ago become part of our law, and we must adhere to them."

OPINIONS.

LORD PRESIDENT BOYLE.—" We are all perfectly satisfied as to what was the intention of Mr. Spalding. He no doubt believed that he was securing the fee of the estate to his son ; and the whole mischief has arisen from the conveyancer employed having done his work in a bungling way. I would wish, therefore, to pause, to see if any means could be devised to prevent the children being deprived of their inheritance ; but really at present I can only see that it would be a very hazardous thing to express any doubt as to the finding in the interlocutor. The case of Falconer is directly in point. The notary here, after reciting the part of the precept which authorizes infestment to be given in liferent, stops short and plays fast and loose with the precept ; and having left out everything by which a real fee could have been conveyed to the children, I cannot doubt that their personal right will not avail as against the diligence of the creditors."

LORD JEFFREY.—" They have their remedy against the conveyancer."

LORD MACKENZIE.—" I must adhere to my old decision in the case of Falconer ; at the same time I was willing to hear argument

HOULDITCH  
v.  
SPALDING.  
1847.

on the point, as this is a confused part of our law. Where there is a conveyance to a father in liferent, and children in fee, I think, if the matter were open, it ought to be found to convey nothing but a liferent to the father himself. But it is settled otherwise. I don't, however, find fault with the law, that a fee cannot be *in pendente*. There was some logic in that ; for why should a man be allowed to convey to a nonentity, or how could a nonentity hold the fee ?”

LORD FULLERTON.—“ I think we cannot alter the interlocutor of the Lord Ordinary. It might perhaps be difficult to explain, on strict principles of theoretical reasoning, the judgments in this branch of our practice ; but there are judgments which appear to me to fix the point under discussion. In the case of Graham, it was decided (M. 6931) that where there was a disposition to a party in liferent, and his children *nascituris* in fee, the infestment in the liferent, without mention of the children in fee, was merely an infestment in the liferent ; though, most unquestionably, if the fee to the children had been mentioned, the infestment would have received effect as an absolute infestment in the fee in his favour. In the same way, it was held in the case of Falconer v. Wright, referred to by the Lord Ordinary, that in circumstances exactly resembling the present, as well as in the previous one of Dundas, January 23, 1823, an infestment of the party in the liferent, for his liferent use *allenary*, was confined to the liferent, though, if the infestment had been exactly in terms of the precept, and included the fee to the children, it would have been held to vest him with the fiduciary fee for their behoof. It might not be easy to explain the effect thus given to the forms of an infestment in favour of persons not named, and not even in existence at the time ; but still the rule seems to be, that to complete the right of fee, there must be, in form at least, an infestment in the fee ; and that, in the case of the liferent being unqualified, the infestment in the fee of the children *nascituri* vests the absolute fee in the liferenter ; while, in the case of the word ‘ *allenary* ’ being added, it vests in him a fiduciary fee for the children when they come into existence. Whatever may be thought of the principle of this, the practice seems too well fixed for us to interfere with it.”

1. The doctrine of a fiduciary fee being in the person of a liferenter allenary, for behoof of persons *nascituri*, raises the question, in what manner are the fiars to make up a title to the fee on their coming into existence? Is it to be by service to the liferenter, or by a conveyance from him, or by an adjudication against him, in the event of his not granting a conveyance, or by a declaratory adjudication, in the event of his dying without having done so; or, lastly, is the title to be made up by the fiar, on his coming into existence, taking infestment on the precept in the original conveyance? A service by the fiar to the liferenter would imply that a title cannot be made up by the fiar until the liferenter's death. A service also transfers to the party serving the right merely that was in the party served to. The right, however, to which a title is desired to be completed is an absolute fee, but the right that was in the liferenter was a fiduciary fee. There seems, therefore, to be no reason in principle why the fiar should complete his title by a service to the liferenter. This mode, however, of completing a title by the fiar, seems to have been sanctioned by the Court in one case.

2. In the case of *DUNDAS v. DUNDAS*, January 23, 1823, a party obtained a Crown-charter, with a precept to himself, "in *vitali reditu pro ejus usu vitalis redditus tantum duran. omnibus diebus ejus naturalis vitæ et heredibus masculis legitimis procreatis*

*aut procreandis ex ejus corpore in feodo; quibus deficientibus,*" &c., and on this charter he was infest "in *vitali reditu tantum,*" but no infestment was taken in favour of the children. Lord Dundas having died, his son, conceiving that that part of the precept in the charter, whereby sasine was ordered to be given to the heirs-male in fee, was unexecuted, expedite a general service in that character to his father, and was infest on the precept contained in it. Doubts having arisen as to the validity of this title, an action of declarator was brought by the pursuer, as next heir of entail, who objected that, by the charter, a fiduciary fee had been vested in Lord Dundas, and that his infestment had exhausted the precept. In support of his objection the pursuer PLEADED,—The title made up by Lord Dundas proceeded upon the erroneous idea that the precept in the charter 1787 remained unexecuted, so as to be competently taken up by a general service of the defender as heir to his father, and to be again used as a warrant for infesting the defender himself in the same estates. By the legal construction of the deed of entail in 1768, the defender's father had in his person not only a proper liferent right for his own behoof, but also a fiduciary or trust fee for behoof of his eldest son and the succeeding heirs of entail. The precept, therefore, in the charter of 1787, must be held as completely exhausted by the infestment taken by the defender's father in 1788. It is an established

maxim of the feudal law that a fee cannot be *in pendente*. The defender's father, therefore, must be held to be the *fiar* of the estates. If, therefore, the charter of 1787 conveyed to the defender's father, both a *liferent* of the estates for his behoof, and also a *fiduciary* fee for behoof of the defender and the other heirs of entail, then the *infestment* which the defender's father took upon that charter exhausted the precept contained in it. In order, therefore, to make up a valid title to the estate, it is incumbent on the defender to connect himself with the last investiture in some way which shall not be liable to objection, and the object of the present action is to have it found that the mode which has been adopted in making up his title is not a valid one, and that he should be decerned to make up a valid title without delay. If, however, it shall appear to the Court that the precept in the charter 1787 can still be held as remaining unexecuted, in so far as regards the fee of the lands, and that this can be competently taken up by the defender's general service as heir-male of his father, the pursuer will be perfectly satisfied with the title already made up by the defender.

3. The defender, Lord Dundas, PLEADED,—A service as heir of provision under the entail to Sir Laurence Dundas, would be incorrect, in respect that the entail does not convey the fee to Sir Laurence himself. No right, therefore, remained in him which could be taken up by a service. A special

service to the late Lord Dundas would be equally incorrect, because by the entail the fee of the estate was not conveyed to him, but the *liferent* only. The fee was conveyed to the heir-male of the marriage. The defender, therefore, was the institute under the entail. The only right of fee which the defender's father possessed, was that of *fiduciary* *fiar*. With respect to the nature of a *fiduciary* fee two views may be taken. *First*, It may be considered as resembling a right of property vested in trustees for the behoof of third persons, and, consequently, capable of being feudalized by the trustee taking *infestment*. *Secondly*, It may be regarded as existing merely by a fiction of law, from the necessity of vesting the fee somewhere until the existence of the real *fiar*. Whichever of these two views may be considered as correct, the mode of completing his title adopted by the defender appears to be correct. There was nothing to have prevented Lord Dundas from expediting a real right to his *liferent* while he retained a personal right to the *fiduciary* fee. The question therefore arises, was Lord Dundas *infest* in the *fiduciary* fee or the *liferent* only? If he was *infest* merely in the *liferent*, then the charter, which also conveyed a personal right in the fee, was still open, and by the general service expedite by the defender, he acquired right to the precept in the charter, in so far as it was unexecuted. Hence, therefore, the *infestment* expedite by the defen-

der, is valid. If, again, it be held that the fiduciary fee in the defender's father existed merely by a fiction of law, then it seems to follow that the fiction is at an end so soon as the necessity for which it was created ceases to exist. Accordingly, when the liferent of the defender's father was extinguished by his death, the faculty which he could have exercised over the fee was also extinguished. In this view, therefore, the right to the fee, which remained personal by the precept in the charter 1787 being unexecuted in so far as regarded the fee, became validly transferred to the defender, by the retour of his service as the heir-male of his father. The liferent became extinguished by the death of the liferenter, and every faculty, power, and commission, fell with it. These burdens being removed, it was open to the defender, as the fiar called by the investiture, to expedite his title, and this he apprehends he has done validly by his general service as the heir-male of his father, and the infeftment passed upon the precept contained in the charter 1787. The Court "Sustained the defender's title as valid, and assoilzied."

4. The case of *WELLWOOD'S TRUSTEES v. WELLWOOD*, February 23, 1791, may be here given, not on account of the judgment pronounced, for that does not bear upon the point under consideration, but on account of the opinions delivered by the Court at the advising. In that case Henry Wellwood executed an entail of his

lands in favour "of himself in liferent, for his liferent use only, during all the days of his lifetime, and failing of him by decease, to Robert Wellwood, his nephew, and the heirs-male of his body." The usual prohibitory, irritant, and resolute clauses, respecting the selling of the estate or contracting debt, were directed generally against the heirs of entail; but in several places of the deed the nephew was referred to as "the said Robert Wellwood, my nephew, and the other heirs of tailzie before mentioned." On the death of the entailer, the nephew made up titles to the estate, by executing the procuratory of resignation which constituted the deed of entail. He afterwards brought a declaratory action against the heirs of entail, for the purpose of having it found, that being *nominatim* disponee institute and fiar in the estate, he was not an heir of entail, and therefore not liable to any of the conditions or restrictions contained in the entail.

5. In support of his action the pursuer PLEADED,—By the conception of the entail the pursuer was made fiar, the only right remaining in the entailer being a liferent by reservation. Even in the case of a deed executed by a father in favour of his son, the son would take as disponee, not as heir; for it is only in consequence of the maxim in law, that a fee cannot be *in pendente*, that a destination to a father in liferent, and to children *nascituri* in fee, renders the father constructive fiar. But where the fee is given to the son *nominatim*

him, the fee is in him. It is true, this fee may be defeasible, and the presumptions in favour of the father's reserved power are strong; and cases may be put, where, notwithstanding of such a fee, the substantial interest of the estate remained in the father, and the fee of the son might be defeated or impaired by the deeds of the father. But still this right of fee in the son, if not defeated by the father, carries the full right and property of the estate. Thus, if a father convey to the son, reserving his own liferent and a power to alter, but dies without exercising this power, the son takes up the estate, as donee. The reserved interest of the father has not the effect of rendering it necessary for the son to complete his titles by a service. But, in the present case, where the deed is granted not to the heir *alioqui successurus*, there cannot be a doubt that the fee was conveyed to the pursuer, and that nothing more than a liferent, by reservation, remained in the granter; and it was impossible that the pursuer could have made up his titles by a service. He was neither heir of line nor of provision to the granter. There was no fee in the granter descendible to him as heir of provision. He was donee, and the heirs were heirs of tailzie and provision to him, not to the granter.

6. The defender PLEADED,—Although *ex figura verborum* the entail resigned in favour of himself, in liferent, for his liferent use only, yet instead of vesting the fee in the pursuer, he is only

called to the succession thus:—“Failing of me by decease, to Robert Wellwood.” The pursuer, therefore, cannot be considered as an institute or donee, but as an heir of entail, and in order to make up a proper title to the estate, he ought to have been served heir of entail and of provision to the granter. To say that the pursuer could not have completed his title by a service, because there was no fee in the granter descendible to him as heir of provision, is just a *petitio principii*, for if it be supposed that the fee was in the entailor, then the pursuer could have made up titles in no other way than by a service. If the pursuer had predeceased the entailor, in what manner could the pursuer's son have completed his title? If he had attempted to acquire right to the unexecuted procuratory by a general service, it would have been objected that his father, during the lifetime of the entailor, had no interest which could be carried by a service, and the defender must have served as heir of entail to the granter. It therefore necessarily follows that the pursuer must have completed his title also by a service.

7. The Court “Decerned in favour of the pursuer.” LORD EAKGROVE observed,—“Where the granter of a deed dispones to himself, a fee is thereby constituted in his own person. But here it is for the granter's ‘liferent use only, during all the days of his lifetime, and failing him by decease, to Robert, his nephew.’ The entail

concludes with renouncing all power of alteration, and declaring the deed to be in full satisfaction to Robert of all claims, &c. On this settlement a charter might have been expedited *de plano* to the granter in liferent, and Robert in fee. It was not conceived to Robert on the death of the granter and his heirs, but disposed directly to him, and therefore there was no occasion for a service to complete his title. Liferents by reservation, although they sometimes are held to be fees, yet, where they are expressed to be for liferent use alienably, the same interpretation will not be given; they will always be held pure liferents, and incapable of giving any right more substantial. A fee cannot be *in pende*; therefore, when a father reserves a liferent in his marriage contract, as there are no heirs in existence, the liferent is rightly construed to be a fee in the father; but the expression in this case is much too strong to admit of this interpretation. It is to be held a mere right of liferent. This is confirmed by the reservation of powers to set tacks in particular cases, (all other powers are renounced;) so that here Robert is to be considered as a direct donee, who does not need a service. And as all the prohibitory, irritant, and resolutive clauses are directed only against the heirs of entail, he cannot, consistently with the decision in Edmonstone's case, be subjected to them."

8. LORD PRESIDENT CAMPBELL observed,—“ The Court will al-

ways support Duntreath's decision. If this case be the same, it is decided. The only difficulty here arises from a doubt where the fee lies. This is a very nice question. My wish, I confess, certainly is to make this gentleman free. It is fair to wish so; it is a wish which the law approves of. But I am not clear whether I can, on grounds of law, gratify that wish. My difficulty is founded on the clause hinted at by Lord Swinton. It is a rule well fixed in law, that a fee cannot be *in pende*; it must either be in the granter or in the donee. This is illustrated by the first words of the settlement, ‘ In favour and for new infeftment to be made, given, and granted to myself in liferent, for my liferent use only, during all the days of my lifetime, and failing of me by decease to my heirs of tailzie and provision,’ &c. Here there is no heir named; and it would seem that though, in this case, *ex figura verborum*, the granter has merely a liferent, it will in law be construed to be a fee. Perhaps the fee would be only fiduciary; but, although these words, ‘ for liferent use alienably,’ would no doubt make it merely a fiduciary fee, yet it would be a fee. It does not signify whether it be a simple fee, or otherways. It is a fee in that person, for the fee must rest somewhere, and can in such case rest only in the granter. To a person thus holding the fee, the heir must make up a title by service. Suppose, then, that no name had been mentioned at all, Robert Wellwood must have served

heir, and all the clauses of the tailzie would have applied to him. What then is the difference produced by the words in the depositive clause? They are, 'to me, the said Henry Wellwood, in liferent, for my liferent use allenary, during all the days of my lifetime; and failing of me by decease, to Robert Wellwood, my nephew, &c. If these unfortunate words, 'and failing me by decease,' which have been the source of so many disputes, had not occurred in this deed, there could have been no question. Lord Eskgrove's opinion, that a charter might have been expedite to Henry in liferent, and to Robert in fee, must in that case have been adopted. But these words must have the effect (if such a thing were possible) of keeping the fee *in pendente*. As this is impossible, they must at least keep the fee from vesting in Robert, till Henry's death. The fee must therefore rest with the granter. He ties up his hands, it is true. He makes himself a fiduciary fiar; but, if he be a fiar at all, Robert must enter by service; and this, *eo ipso*, makes him an heir. In the first clause of the disposition the words run thus,— 'to myself in liferent, &c., and failing him by decease, to the heirs after mentioned.' This surely includes Robert; but it would be wrong to catch him by this expression, if there were real grounds for supposing that there was a fee in his person. On the whole, there must necessarily be a service, and the person who serves must, as heir of entail, be included

under all its prohibitions. There is a decision in the Dictionary, p. 367, where the lands were taken to one, and failing by death, to the eldest son. But that case was different from this, for there no liferent was mentioned. And the only question remaining is, Whether does the mention of liferent allenary do more than make it a fiduciary fee?"

9. LORD JUSTICE-CLERK MAC-QUEEN observed,— "This is a nice question. There is here a settlement of the whole estate. The whole of it, liferent fee, &c., is taken up by the tailzie, and the only question is, Where is the fee? When a father settling his estate in his marriage-contract takes it to himself in liferent, and the children of the marriage in fee, the father is construed to be the fiar. And there is a good reason for it; *first*, Because the fee cannot be *in pendente*, and therefore must vest in him, since there is no other in whom it can vest. *Secondly*, Because there is a natural presumption, that a father, though he intends to settle his estate on his child, means to retain the full property of it until his death. This has been decided often. But, suppose the estate is taken to himself in liferent, 'for his liferent use only,' he in that case reserves no earthly power over the estate. He enjoys the rents, it is true; but he can exercise no right, except that of a mere liferenter. His creditors are not entitled to carry it off. It may be said that there is no child, that nobody has an interest, and that the fee can-



not be *in pendente* ; and it is very true, that, though entitled only to the liferent, as there is no heir existing, the father has the fee. But it is a mere caducuary fee, falling to the heir of the marriage on his existence. The creditors of the father are not entitled to affect the estate, but merely the liferent. Here there is no such necessity. The heir is existing ; he is called *nominatim ex voluntate testatoris*. There is here then no necessity for making the fee remain with the granter. He expressly declares that he renounces all the powers of a fiar. There is a pure fee in Robert. The words, 'and failing me by decease,' means merely that Robert is not to exercise his right till the granter's death. It was asked, How titles would have been made up if Robert had died ? To say they would have been made up to the granter, is a mere *petitio principii*. They would certainly have been made up to Robert, for he had the fee. The case put by the Lord President is different from the present. It is the same with a marriage settlement, where the fee, *ex necessitate*, must be in the granter ; but here there is no such necessity, where the disposition is to the father in liferent 'for his liferent use allenary,' and to the son in fee. If the son serve heir of provision, he will no doubt be liable, in that character, for the debts of the father ; but he is not obliged to do so. The father, in such a case, would be merely the trustee for his son, and a truster is not obliged to serve to a trustee. He has a *jus*

*crediti* under the right. The heir, on his existence, may bring an action of declarator of trust against the father, for having him declared to be mere trustee ; and the titles might be made up in this way. He is not obliged to serve, for the fee is in himself. In this case, Robert might have brought an action against the brother of Henry Wellwood, the lineal heir, to denude him of the estate. But there is no occasion to enter into these cases ; for here the fee cannot be with the granter, who has reserved only a mere liferent. It must vest in the person of Robert Wellwood."

10. In the case of *MAXWELL v. LOGAN*, December 20, 1836, John Maxwell conveyed his lands to Mrs. Logan "in liferent only, during her lifetime after me," and to the second son to be lawfully procreated of her body, and the heirs to be lawfully procreated of his body ; whom failing, to his children in a certain order. The entailor died in 1793, and John Logan Maxwell, the second son of Mrs. Logan, was not born for two years afterwards. The fetters of the entail were directed against Mrs. Logan, *nominatim*, "or of any of the heirs called to the succession." In 1816, the second son of Mrs. Logan was served heir of entail and provision to the entailor, and he took infestment under the entail. In 1834 he raised a declarator against the substitute heirs, to have it found that the fetters of the entail did not apply to him, as he was the institute, but only to the heirs of entail.

The substitute heirs PLEADED,—Although it is indisputably fixed that fetters which are imposed only upon heirs, do not bind the institute, still that rule is not applicable in the present case, because the pursuer was not born for two years after the entailor's death. During that period the fee of the entailed estate, which could not be *in pendente*, was necessarily in Mrs. Logan, the pursuer's mother, either as fiduciary fiar or otherwise. In consequence of this the pursuer could not take up the estate without a service. This proved that the pursuer took as heir and not as institute, and accordingly he did expedite a service as heir of provision and entail. The pursuer PLEADED he was the institute by the terms of the disposition. He was not indeed called *nominatim*, because he was not born at the date of the deed; but he was designated and individualized as distinctly as if named, by being described as the second son of Mrs. Mitchell or Logan. The disposition conveyed the liferent only to her, and it was as donee that he took the fee. The service took nothing out of the *hæreditas jacens* of the entailor under the entail, because the entailed disposition itself included everything, and effectually conveyed away both fee and liferent from the entailor. The service had merely the declaratory effect of instructing that John Logan Maxwell was the donee or institute under the entail; and a process of declarator in this Court would

equally have served the purpose of enabling him to take infeftment under the precept or procuratory in the disposition, by legally certiorating the notary that he was the donee. The full right of fee was already vested in him, but burdened with the liferent of his mother.

11. LORD COREHOUSE, Ordinary, "Decerned in terms of the conclusions of the libel." In a Note his Lordship observed,—"The Lord Ordinary hopes it is no longer necessary to state the grounds of a judgment, finding that the fetters of an entail, imposed upon heirs only, do not bind the institute. If it be, no point in the law of Scotland can be held as settled. The attempt to shew that John Maxwell Logan is not the institute, but an heir of entail, it is thought has entirely failed. The estate is conveyed to his mother in liferent, for her liferent use only, and to her second son. The fee vested in the second son Maxwell Logan, *ipso jure*, as soon as he came into existence as institute. No fee could be transmitted to him from his mother. If he served heir to her, it was for the purpose not of acquiring, but of declaring a right to the estate. None of the decisions cited by the substitute heirs bear upon the case." The defenders reclaimed, and explained that there was an inadvertency in the Note of the Lord Ordinary as to a matter of fact, in supposing that the pursuer had served heir to his mother, as she was still alive, and that it was to the entailor that he had

served. The Court "Adhered." LORD PRESIDENT HOPE observed,—"That makes no difference whatever. The interlocutor on the merits is clearly right."

12. In the case of *ANDREWS v. LAURIE*, December 12, 1849, a party, by his trust-disposition and settlement, left a legacy of £500 to Mrs. Andrews, in liferent all-en-ary, and to her children in fee. The trustees conveyed to the beneficiary under the trust the lands contained in the settlement, and in the conveyance the legacy of £500 was declared to be a real burden upon the lands conveyed. On the death of Mrs. Andrews, her children were served heirs of provision to their mother, and raised a summons of poinding the ground. The proprietor PLEADED in defence, that the pursuers had not expedite a sufficient title to maintain the action, as under the destination the fiduciary fee was in their mother, and that their proper course was to take up the succession by a declaratory adjudication. The pursuers PLEADED,—"That their service to their mother as fiduciary fiar was in conformity with the universal practice since the case of Dundas, but that even without a service they had a right to insist in the action, as it was not disputed that they were the children of Mrs. Andrews. LORD WOOD, Ordinary, "Repelled the defence," and the defender having reclaimed, the Court "Adhered." LORD JUSTICE-CLERK HOPE observed,—"I should have been quite satisfied with the service in this case, but I do not

conceive a service to be necessary. On the death of Mrs. Andrews, her children, as legatees, were entitled to carry on every action necessary to establish their rights. Had there been any question as to the fact of these parties being the children of Mrs. Andrews, the case would have been different. But this is not disputed here. A declaratory adjudication would be an expensive and a perfectly unnecessary process in the present circumstances."

13. In the case of *EMSLIE v. FRASER*, February 13, 1850, the question was raised but not decided, whether a fiduciary fiar had power to act as a trustee for the real fiars, so as to bind them by any proceedings adopted by him for the protection of the estate. In that case a summons of wakening was raised, for the purpose of transferring against the defender a former action, which had been raised by the defender's father, relative to settling the marches of conterminous estates. The defender's father had possessed his estate under a destination, in favour of himself in liferent, but for his liferent use only, and to the heirs whatsoever of his body in fee. On this conveyance, which was executed by his father in 1808, the defender's father was infeft in liferent, for his liferent use only, but the instrument of sasine made no mention of the fee. In the action raised by the defender's father, and which was sought to be transferred against the defender, he set forth that he stood heritably infeft in the lands,

and that he had the sole and exclusive right in them. The defender was born subsequent to his father's infestment, but prior to the raising of the former action. On his succeeding to the estate, he made up his title as heir of provision to his grandfather under the disposition by him, and not as heir of his father. He objected to the former action being transferred against him, on the ground that he did not represent his father.

14. In support of the action of transference, the pursuer PLEADED, —The deed of 1808 having taken full effect by the death of the defender's grandfather in 1809, and infestment also having followed on it prior to the defender's birth, the fee could not possibly vest in the heirs of the defender's father's body, who did not then exist, and must have vested in the defender's father as *fiduciarius* for the eventual beneficiaries. In this state of matters, the fiduciary fiar was necessarily vested with the same power to raise and defend actions for the benefit and protection of the estate, which would have been competent to an ordinary trust-dispensee for parties still unborn. These powers could not be affected by the subsequent birth of the defender, seeing that it was impossible for him to take up or claim the character of heir of his father's body till his father's death. At all events, these powers must have remained as formerly, so long as the defender was in pupillarity, and nothing whatever was done to connect him with the estate.

Infestment is not necessary to entitle an ordinary dispensee, or a trust-dispensee, or *fiduciarius*, to protect and vindicate, by declarator or otherwise, the marches of the estate of which he is in possession. But, in any view, the mere objection that his heritable right had not been feudalized by infestment, could not be pleaded after litiscontestation in the declaratory action, and by one who had convened and joined issue with him as the proper party in a prior depending action as to the same marches. There being thus no room for such an objection by the opposing party, it can, in no view, be competently raised by the defender, for whose benefit the action was instituted by his trustee or *fiduciarius*, who alone could act for him at the time, and a judgment in whose favour would have been available to the defender. As the defender, on the one hand, could not have been prevented from sisting himself in and following forth the action, in virtue of the Statute 1693, in room of his *fiduciarius*, it must be equally competent for the pursuer, on the other hand, to waken and transfer the action against the defender. Assuming the depending action to have been one in which a judgment would have been *res judicata* on the question of disputed marches, it follows that, as an accessory to the estate, it may be taken up by, or wakened and transferred against, the proprietor of the estate for the time being.

15. In support of the defender's

objection to the transference of the original action, the defender **PLEADED**,—The right in the defender's father having amounted to nothing more than a naked usufruct, he was not *in titulo* to prosecute an action calculated to prejudice or affect the present defender, who has succeeded to the estate, not through him, but altogether independently of him, and the defender cannot be implicated with any such action. More especially is it incompetent to waken and transfer an inchoate process raised and depending at the instance of the late Mr. Fraser against the present defender, who does not represent him, or take or succeed to the estate by or through him at all. The assumption that the late Mr. Fraser was vested in the fiduciary fee of the estate, for and on behalf of the defender, cannot aid the pursuer, inasmuch as—(1) That assumption has been shewn to be wholly groundless in fact; and (2), at any rate, a fiduciary fiar cannot be held, either on principle or with reference to the authorities, to have any warrant or power to institute an action of the nature of that sought to be wakened and transferred. It is equally unavailing for the pursuer to argue that the late Mr. Fraser had at least a personal right to the fiduciary fee, in respect (1), That such a right would not supply the requisite power or title; and (2), that, at any rate, it was not in the character of fiduciary fiar, infeft or not infeft, that the late Mr. Fraser brought the action referred to. The present pursuer

having been himself in existence when the action referred to was brought, and during the whole time it depended, and not having been a party to it in any shape whatever, it was and is inept, and cannot be wakened and transferred against him. And the old or original action having been raised and prosecuted by the late Mr. Fraser on the assumed but false title of his being absolute and exclusive proprietor of the estate in question, that action cannot now be wakened or transferred against the defender, who is not bound to recognise it at all.

16. The LORD ORDINARY having reported the case with a Note in favour of the pursuer, the Court “ Found, that the action on the grounds laid cannot be sustained, and assoilzied from the conclusions for transference of the action of declarator referred to.” LORD PRESIDENT BOYLE observed,—“ I am not satisfied that I can adhere to the views expressed in this note. Look to the original title of the elder Fraser. It has not been made out to my satisfaction, that the disposition conveys the fee to the eldest son of the granter; for while he makes himself institute in the liferent, he conveys the estate to the son ‘ in liferent, for his liferent use only, and to his heirs whatsoever in fee.’ These heirs are clearly the fiars. Suppose this had been an entailed estate, instead of a fee-simple, and one of the younger brothers of the deceased Mr. Fraser had brought an action of declarator, that in respect the tailzie prohibited alienations,

an irritancy had been incurred by this deed, would it not be a sufficient defence that he had not the fee but a liferent—that it was not an alienation, but a mere propelling of the estate to those to whom it was destined? No fiduciary fee even was granted to the second Francis Fraser, the pursuer's father; he was a mere liferenter. No doubt he was a consentor to the deed; but he voluntarily took the estate with this limited right. It was conveyed to him in the first place in liferent, and to the heirs of his body in fee. We have not here a transference of the Sheriff Court process. We have no such question; but we are to decide whether Mr. Emslie is entitled to have a transference *activè* of the process before this Court, the person who raised it being only a bare liferenter. I can easily conceive the heir to that person, who makes up a title *aliunde*, to have good grounds for repudiating the action altogether, and objecting to any process which would make him a party to it. This is not a transference *passivè*; its object is to make the defender the *dominus litis* of the old action, and that on the motion of Mr. Emslie. I see no ground for this. Mr. Emslie wants to get benefit by reviving this declarator; and it is out of the question, looking to the state of the titles, to hold that the present defender represents his father. Therefore I must own that I cannot adopt the views of the Lord Ordinary."

17. LORD MACKENZIE observed,—"I have extreme difficulty. The

point is a very nice one, but on the whole I am inclined to concur in the views of the Lord Ordinary. In the first place, I rather consider that the disposition by the defender's grandfather made his son the fiduciary fiar, after his death. Indeed I think he was fiar before that. This interpretation appears to me to follow out the decision in the case of Newlands. In that case there was a grant of the liferent alienarily to Lieutenant Newlands, with the fee to his children *nascituris*. That was held to imply a grant of a fiduciary fee to the liferenter. If that be true, observe what was done here. The grandfather grants the estate in liferent to himself, and in liferent only to his son, and in fee to his son's heirs, then unborn. Does not that imply that the son's right was a liferent for himself, and fiduciary fee for his children? If it is a grant to himself in liferent, and in liferent only to his son, and to the son's heirs *nascituris* in fee, that is just Newland's case. I humbly think that, under the terms of this disposition, the fee was in the granter's son. It may have been difficult to contrive a form of infeftment applicable to such a case, but I do not think the want of a form of infeftment can prevent the son from being fiduciary fiar for his heirs. He stood so, in my opinion. He was fiduciary fiar for his unborn son. In this position, what were his rights? The estate was attacked. Had he, or had he not, a right to defend it? Most clearly, as fiduciary fiar, he had that right. If

not, who had it? I never heard of an application for the appointment of a *factor loco non existentis* in such a case; and that would be necessary, if the fiduciary fiar could not defend the estate. If he were infest in the estate, he was entitled to state himself as fiduciary fiar. He defended himself, in the first place, and then he raised a declarator of property. I do not see that there was any error in all this. It is said that he committed an error, first, in declaring himself to be infest, when he was not infest, and next, in describing himself as proprietor, when he was only fiduciary fiar. That certainly creates another difficulty, but it does not make the action an absolute nullity. I certainly think that, being fiduciary fiar, he was entitled to defend the estate, and raise this action; and I am rather of opinion that the summons could be corrected, by saying that he held the property as fiar, but subject to a trust for certain beneficiaries. I cannot therefore think that the action is a nullity. Then the case is at an end; for there is no doubt about the transference. The clearest of all transference is that operated by the death of the trustee against the beneficiaries. I think the transference is well founded. There are difficulties in its way, but they are not insuperable. As to the circumstance that the defender made up his title as heir to his grandfather, if he is liable to a transference of this action, raised by his father as his trustee, he cannot get rid of it by the way he makes up his title. He incurs no

danger of liability for his father's debts, as the action will not be transferred against him as his father's heir, but as the beneficiary for whom the estate was held. I must say, however, that I feel much difficulty, and I should like to hear farther argument."

18. LORD FULLERTON observed,—"I have no objection to hear further argument, particularly on that part of the case which goes to settle what is the nature of the powers held by this party, in the event of it being found that he was a fiduciary fiar. I have great difficulty there; for though the term, 'fiduciary fiar,' has been introduced into, and is now recognised by the law, still if the party is nothing more than a mere liferenter, I do not see that he is to have the powers of a trustee because he is called a fiduciary fiar. Even in the case of Newlands, there was great difficulty. That whole proceeding was adopted to avoid an anomaly in the law. The object of the legal principle there established was to secure the intention of the granter of the deed, by taking the fee out of him; and as the fee could not be *in pendente*, the notion was adopted of establishing a fiduciary fee in the liferenter. But I do not think the decision went any farther than that; it was meant merely to satisfy that requirement of the law. I desiderate any authority for the proposition, that, in such a case, there is any proper trust in the liferenter. Is this doctrine to be carried beyond the case of a fiduciary fee for behoof of the

children of the liferenter himself ? We can conceive a disposition to A in liferent allenary, and to the children *nascituris* of B in fee. No doubt, the fee is vested in A, so as to take it out of the granter ; but can it be said that A, who has no connexion with the children of B, is to be looked upon as a trustee for them ? That is a very delicate question. Then, in this case, the liferenter chooses to take an infestment that does not divest the granter ; he is infest for his liferent use allenary. The very object of resorting to this notion of a fiduciary fee in the liferenter is to protect the rights of the fiars by divesting the granter. But if the liferenter takes an infestment which does not divest the granter, I do not see how he can be called a fiduciary fiar. It is said he had a personal right to the fiduciary fee ; but how is he to make up his title ? In the case of Dundas, the infestment was taken in virtue of the precept in the original charter. I think taking infestment was essential to making this party's right a fiduciary fee ; for infestment is necessary to take the fee out of the granter, which is the only object of this fiction of a fiduciary fiar. His infestment confined his right to a bare liferent, and I do not see

how he can have any possible right to a fiduciary fee. At the same time, the whole question as to the effect of a conveyance such as this is involved in so much obscurity, that I have no objection to hear farther argument. But I must say, I am much moved by the simple view of the case presented to us by the counsel for the defender. We see that the action was raised by the late Mr. Fraser, not as liferenter or fiduciary fiar, but as the party having the actual right to the estate. This is a most proper mode of libelling when the pursuer is the absolute proprietor, but not when he is merely liferenter or fiduciary fiar. Now, can we compel this party, who denies that his father was proprietor, to go on with this action ? There are conclusions in it in which he cannot be called on to acquiesce. That specialty appears to me to be quite enough for the disposal of this case." The counsel for the pursuer then moved the Court to order farther argument on the general effect of such a conveyance as the one in question, and the proper mode of taking infestment upon it. LORD PRESIDENT BOYLE, however, observed,—“It is unnecessary to go into that question.”

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*A conveyance to Trustees for behoof of a parent in liferent, and his children nascituri in fee, imports a fee in the children, and a liferent merely in the parent.*

I.—SETON v. SETON'S CREDITORS.

CHARLES SMITH, in the marriage-contract of his son with Mrs. Seton, obliged himself to invest £8000 in land, or in heritable securities, and to take the titles in the name of certain trustees, for behoof of his son, "Hugh Smith, in liferent, and the heirs-male to be procreated of the marriage, in fee." In part implement of this obligation, he purchased certain lands, and conveyed them, together with an heritable bond, to the trustees, but at his death there remained a balance of above £3000 against him.

March 6, 1793.

NARRATIVE.

The trustees conveyed the lands to the heir of the marriage, in terms of the trust; but the heritable bond, with the consent of a quorum of the trustees, was paid to his father, who was himself one of the trustees.

In a ranking of his father's creditors, the heir of the marriage claimed to be ranked as a creditor, *first*, for the balance which his father owed, as representing his father, Charles Smith; and, *secondly*, for the amount of the heritable bond which was paid to his father, as trustee, and had not been employed in terms of the marriage-contract. To this claim the common agent objected.

PLEADED FOR THE OBJECTOR.—If in a simple obligation the claimant's grandfather had bound himself to convey, or had actually conveyed a certain sum or subject to his son in liferent, and his children *nascituri* in fee, the son would have been *fiar*, and the claimant would have had no *jus crediti*. There seems to be no reason for a different construction of the right, when it is taken to trustees for the parent in liferent, and the children in fee, instead of being taken directly to the parent himself. The trustees were not taken bound to denude in favour of the heir of the marriage at any given time, nor were they prohibited from making a conveyance to the father in

ARGUMENT FOR  
OBJECTOR.

SETON  
v.  
SETON'S  
CREDITORS.  
1798.

liferent and the heirs-male *nascituri* in fee. Such a conveyance by the trustees would have placed the father in the same situation as a direct conveyance in similar terms from his own father would have done.

ARGUMENT FOR  
CLAIMANT.

PLEADED FOR THE CLAIMANT.—The legal subtlety which prevents a fee from vesting in children *nascituri*, is completely removed by the appointment of trustees, who supply their place, and are, while the trust subsists, fiars of the subject. The case then comes to be precisely the same as if the obligation had been taken to the father in liferent, and the children *nominatim* in fee, when the father, beyond dispute, would have been only a naked liferenter. The trustees could not denude themselves of the trust before the existence of an heir of the marriage. They then became bound to convey the funds in their hands to Hugh Seton in liferent, and the heirs *nominatim* in fee; and so far as Mr. Smith had not fulfilled his obligation, to convey it and the *jus exigendi* in the same terms. The case is the stronger that the obligation did not flow from the father, but from a third party, who vested nothing in the father, but a right of compelling the trustees to give him the liferent of the subject, they continuing fiars till the heirs of the marriage obliged them to denude in their favour.

JUDGMENT.  
March 6, 1798.

The Court “Repelled the objections, and sustained Archibald Seton’s claim.”

OPINIONS.

In the Faculty Report it is stated, “The Court were unanimously of opinion, that the effect and sole intention of appointing trustees was to prevent the father from being fiar. The subject, it was observed, was vested in the trustees, who held the fee for behoof of the children, and the liferent only for the father. If they had paid the sum to Hugh Seton, they would, as infringing on the trust, have been liable in damages to Archibald.”

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II.—ROSS v. KING.

In 1821 Captain Bowie executed a settlement, by which he made over his whole property, heritable and moveable, to General M'Nair, whom failing, to Charles Moreland, as trustees. The residue of the moveable property was directed to be given to William Bowie, the testator's natural son. With regard to the heritage the provision was as follows :—" And in the last place, it is my will, and I hereby direct that my said trustees shall hold my whole heritable property, with the household furniture, plate, and other effects in my dwelling-house, in trust for my said son William Bowie, in liferent, and his lawful issue in fee ; whom failing, for James King, eldest lawful son of the said Mary Bowie and Alexander King, for the said James King's liferent, and his lawful issue in fee ; whom failing, for my said daughter Elizabeth, in liferent, and her lawful issue in fee ; whom failing, for my said daughter Ann in liferent, and her lawful issue in fee ; whom all failing, for my said nieces Eliza and Helen Mackenzie, equally between them, and their heirs and assignees whomsoever. And I ordain my said trustees to convey my property accordingly." June 22, 1847.  
NARRATIVE.

Captain Bowie died in March 1824, at which time William Bowie was only eight years of age. General M'Nair accepted the office of trustee, and was infest in the heritage. William Bowie came of age in 1837, when he was allowed to collect the rents himself ; but General M'Nair still remained undenuded of the real right to the heritage at the time of his death, which happened in 1840. Moreland, the second trustee named in the settlement, declined to act.

In 1841, William Bowie executed a general disposition and settlement of all his estate and effects, heritable and moveable, in favour of James Hunter Ross ; and thereafter he died unmarried, and without issue. Ross thereupon raised an action of declarator and adjudication against the heir of General M'Nair, Moreland, and the substitutes in the destination, to have it declared that a right of fee had vested in William Bowie, and that he had validly conveyed it to the pursuer by his general disposition.

ROSS  
 v.  
 KING.  
 1847.

The defenders pleaded, that nothing more than a liferent was given to William Bowie, and therefore that the fee could not be carried to his general disponee.

Lord Ordinary's  
 Interlocutor.

LORD IVORY, Ordinary, " Found it incompetent, in the present question of construction, to look to any circumstances extraneous to the trust-deed, and more especially to the acts or writings of any party other than the truster himself, in order to reach the true meaning and intention of the truster ; and finds that the true meaning and intention of the truster, as to be gathered from the whole terms and conception of the trust-deed, must be held to have been, not to give to the late William Bowie, in whose right the pursuer here insists, an estate of fee, but, on the contrary, the liferent merely of the property in dispute : Therefore sustains the defences, assoilzies the defenders *simpliciter* from the conclusions of the libel, and decerns."

In a Note his Lordship observed,—“ The Lord Ordinary holds this case to fall substantially within the principle of the case of Seton, March 6, 1793. It is not at all the same case as Robertson, 20th November 1806, where the only direction given to the trustees was to ‘ dispone, transfer, alienate, and make over, in favour of my son, upon his arrival at the age of twenty-one years complete, and behaving well, and to the satisfaction of said trustees, and that in liferent, for his liferent use, and in fee to the heirs-male of his body, whom failing,’ &c. The specific period at which disposition was to be granted—the express designation of the son, as disponee—and the farther most important circumstance, that it was only in regulating the form and terms of the disposition to be thus executed in his favour, that any ulterior words of destination were employed, all tended, in Robertson’s case, to bring out the *animus* of the truster, and to show, that while it was for his son primarily that the disposition was intended, the effect of the destination, directed to be introduced, was left to rest upon the ordinary legal construction to be put upon the executed deed. In other words, the destination was to be construed exactly as similar terms of destination would be, when occurring in a direct dispositive deed.

“ No doubt, had the direction here been, not to ‘ hold my

ROSS  
v.  
KING.  
1847.

whole heritable property in trust for my said son William Bowie, in liferent, and his lawful issue in fee,' &c., but 'to convey the same to William Bowie in liferent, and his issue in fee,' the case would have run upon all-fours with that of Robertson. And the pursuer endeavoured to bring the question up to this point, by force of the general direction inserted at the very close of all the trust purposes, 'and I ordain my said trustees to convey my property accordingly.' But the Lord Ordinary cannot adopt a reading of the deed, which would essentially neutralize, and deprive of all effect, the previous express direction to hold the property in trust. That, as the Lord Ordinary conceives, was the leading and primary object which the truster had in view; and, had it stood alone, its legal operation could not have been misunderstood. Now, it is not to be presumed that this, the plain and natural import of the trust, was intended all at once to be upset, and contradicted, and rendered nugatory, by the posterior direction to convey. On the contrary, if there be any difficulty or ambiguity from a supposed conflict between the two clauses, it is this latter clause, which, as being merely subsidiary and adjected, must give way, so that full effect may be given to the former. But there is truly neither difficulty nor contradiction in the case. The trustees are directed 'to convey accordingly;' that is to say, to convey in such a way and manner as shall not defeat, but accord with and carry into effective execution, the previously declared trust—in short, the true principle of construction being, so to read the deed, as that an effective meaning shall be given to every part of it. It humbly appears to the Lord Ordinary that this may, and only can be done, by interpreting the direction 'to convey' as having reference to the previously expressed purpose for which the trustees were to 'hold in trust;' and hence, as the trust is declared to be a trust (1) 'for my said son in liferent,' and (2) for 'his lawful issue in fee;' so the conveyance must be such as shall secure both of these distinct interests. Accordingly, just suppose the truster to have survived so long, as that his son, when the trust came to take effect, had had a child alive, could it ever be maintained to have been the meaning, that the trustees should execute a conveyance without inserting therein the child's name, *per expressum*, as a liar?

ROSS  
v.  
KING.  
1847.

Yet if, in such a case, the child must, *qua* fiar, have been made a *nominatim* disponee, there would have been an end at once to all claim on its father's part beyond a strict liferent. Now, can the intention of the truster be construed differently, with reference to a child born after, and a child born before, the date of his trust coming into effect?

"It was maintained by the pursuer, that, in any conveyance to be executed by the trustees, they must of necessity have adopted and used the very words of destination contained in the trust; meaning thereby, that it would have been incompetent for them to convey to William Bowie himself in liferent, without also adjecting the other words, 'and his lawful issue in fee.' But this is to assume the whole matter. Why should not the trustees, fulfilling both of the truster's directions, have conveyed the liferent to Bowie, and held the fee in trust for his issue? Campbell, 30th May 1843, is, so far, an example of such a thing; Lord Fullerton expressly observing (the rest of the Court concurring), 'I think the trustees should only give the pursuer the liferent, reserving the fee till it shall be seen whether she has children.' The case of Campbell is important in another point of view, as settling that, in questions of the present kind, 'we are not to apply that sort of malignant interpretation which is applied to entails. The trustees are not entitled to interpret strictly, if by so doing they defeat the manifest intention of the truster. If the trustees are entitled to look for the true will of the truster, they are bound to give effect to it' (per Lord Mackenzie, *ibid.*) The question therefore just recurs, what did the truster here intend? And the Lord Ordinary is satisfied, that he intended that his trustees should hold the fee in trust for Bowie's issue, in the first instance, should he have any; not that they should so convey to Bowie, as that this trust for his issue should be defeated.

"It is not necessary, at present, to consider any question as to the effect of the ulterior destinations in the trust-deed, failing Bowie and his issue. That question, hereafter, may or may not raise other difficulties. But it does not arise in the present action; and the parties interested in its settlement are not now competently before the Court. The only question here for decision, is the question—whether Bowie himself had more

than a liferent conferred upon him ? and if the Lord Ordinary have rightly disposed of that question in the negative, all right of action, at the pursuer's instance, as Bowie's general disponee, must necessarily fall to the ground."

ROSS  
v.  
KING.  

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1847.

The pursuer having reclaimed, the Court " Adhered."

JUDGMENT.  
June 22, 1847.

LORD PRESIDENT BOYLE.—"This is a point certainly of some little nicety ; but I must own that I have formed a clear opinion in favour of the interlocutor. I think it of importance that this question occurs in regard to the terms of a trust-deed, on which the interpretation would be different from what would be due to a general direct conveyance to A B in liferent, and his children in fee. The very purpose of a trust of this description is to secure by effectual means that the views of the truster shall be fulfilled. In the case of Seton, referred to by the Lord Ordinary, the Court were unanimously of opinion that the effect and sole intention of appointing trustees was to prevent the father from being *fiar*. 'The subject (it was observed) was vested in the trustees, who held the fee for behoof of the children, and the liferent only for the father. If they had paid the sum to Hugh Seton, they would, as infringing on the trust, have been liable in damages to Archibald.' The rule for our decision now must be to give full effect to the will of the testator ; and that must be discovered, by taking his whole deed from beginning to end. The trustees were ordered to pay these legacies, and there were sufficient moveable funds to defray them. Now, we must keep in view the situation in which the testator stood. He had a family of natural children, and therefore he cautiously speaks of his 'lawful issue ;' and it is the latter only who are to benefit in regard to his heritable estate. The trust-deed thus proceeds :—'In the seventh place, for payment to my son, William Bowie, and his heirs, of all the residue and remainder of my moveable property, including any legacies above bequeathed that may fall by predecease or other-ways, but excepting my household furniture, plate, and other effects in my dwelling-house (which I intend to follow the destination of my heritable property, as after mentioned), and in the event of the said William Bowie's death without issue

ROUS  
v.  
KING.  
1847.

before this settlement can take effect, the said residue as aforesaid is to be equally divided among my said daughters, Mary, Elizabeth, and Ann Bowie ; whom all failing without lawful issue, then the residue to be equally divided between my said nieces, Eliza and Ellen M'Kenzie, and their heirs whomsoever.' Then the trust-deed goes on to declare, that his trustees are to hold the ' houses and garden presently possessed by my sister, Mrs. M'Kenzie, in trust for her life rent use and enjoyment during all the days of her life, and after her death, for the life rent use and enjoyment of her daughter Ellen, during all the days of her life.' Then, finally he says, ' It is my will, and I hereby direct that my said trustees shall hold my whole heritable property, with the household furniture, plate, and other effects in my dwelling-house, in trust for my said son William Bowie, in life rent, and his lawful issue in fee ; whom failing, for James King, eldest lawful son of the said Mary Bowie and Alexander King, for the said James King's life rent, and his lawful issue in fee ; whom failing, for my said daughter Elizabeth, in life rent, and her lawful issue in fee ; whom failing, for my said daughter Ann, in life rent, and her lawful issue in fee ; whom failing, for my said nieces, Eliza and Ellen M'Kenzie, equally between them, and their heirs and assignees whomsoever. And I ordain my said trustees to convey my property accordingly.' Here there is the indication of the testator's intention that the trustees should hold for a series of life renters, and also for a series of heirs. We are told that the trustees have found it necessary so to hold the property, and that General M'Nair has so practically interpreted the deed. The legacies have been paid out of the moveable fund ; but notwithstanding this, the General continues to hold the estate of the truster. The question then comes to be, Is there anything else in the deed that prevents us giving effect to the intention ! —in regard to which there can be no doubt. What follows afterwards ? ' And I ordain my said trustees to convey my property accordingly.' These words are certainly ambiguous. One party maintains that this was an injunction to convey out and out, without regard to whether there was lawful issue existing or not ; and then, that if done, it could only be in those terms that would have left the absolute property in the



ROSS  
v.  
KING.  

---

1847.

liferenter. The trustees are to ‘convey accordingly;’ that is, according to the will of the maker. Now, the maker meant to give liferents, in different orders, to these various persons; and that, if any one had lawful issue, there was to be a conveyance in favour of that issue. If William Bowie had a son or daughter, he would be entitled to say, Here is the deed under which you have held the property till this time. I am a favoured liferenter, and have a son and daughter, and it is your duty now to convey. The trustee could not withhold that conveyance—‘to William Bowie in liferent, and lawful issue in fee.’ If that issue existed, the trustee could not refuse that conveyance; but when no such son and daughter exist, and William Bowie is not married, the trustees are not bound to give any farther conveyance to him, except for his liferent. No conveyance like that demanded can be granted now: it would defeat the true purposes of the maker of the deed, who intended to prevent the father obtaining the fee.

“That being my view of the true purpose and intention of the testator, I do not think the case of Robertson a decision to the contrary of the principles I now recognise. There is this distinction between the two cases, that while there is in the one before us a trust created, with power to the trustee to do a particular thing, there is an injunction on him ‘to hold’ the subjects; but in Robertson’s case there was no such injunction. The question comes to be, whether there was a fee in this man or not? I do not think there was; and the case of Robertson cannot therefore rule the present.”

LORD MACKENZIE.—“I am also for adhering to the judgment of the Lord Ordinary. The case is one of some nicety; and I cannot allow that any of the prior decisions quoted are precisely of the same kind. There are some rules that come near it, and which are clear enough. In the first place, where a conveyance is made to a father in liferent, and to issue *nascituris* in fee, that gives the fee to the father; the reason being, that no fee can be *in pendente*. And suppose there were twenty interjected trustees, the rule would just be the same, if their appointment was solely to make the conveyance in the same terms.

“Again, where the order is not to convey out and out, but

ROSS  
v.  
KING.  
1847.

to hold for behoof of a party, then the rule must just precisely be the reverse. I do not, in such a case, see the least reason for saying that the father is to have the fee. Why should directions to hold for the father in liferent, and children *nascituris* in fee, be held to give the father the fee? Why should he get it, seeing the trustees could properly hold it? There would be no danger in such a case of the fee being *in pendente*; and the directions to the trustees to 'hold,' appear to me the strongest indications of intention that the father was not to get it.

"But this case escapes from falling under the one rule or the other. It is taken hold of by both rules, which are pulling at it at once. It is a disposition to the trustees to 'convey,' and also to 'hold.' Now, first, there is a disposition to hold for the son William Bowie and his issue in fee. It was argued that this meant to hold only till certain things be done; but I can see no limit to the holding; nothing to prevent the trustees holding so as to exclude the feudal difficulty as to the pendency of the fee. It is not said that the holding is to be till debts are paid, but to hold indefinitely; and therefore the trustees might perfectly well hold on till a son was born, and then convey. If, then, this were a direction to hold for the children, it would be difficult to say that the father could have a right as beneficiary under the trust.

"But the trust-deed does not stop there. It goes on to say, 'And convey accordingly.' On that word 'accordingly' arises the dispute. One party says, 'According to the intention.' The holding is directed to be in certain words, and the conveyance must be in the same words. That seems natural enough. To this, however, there is a strong reply: The conveyance cannot be in the same words; for if so, the meaning would be then totally different. One says that you are to convey in the meaning in which you are to hold, and the other, that you are to convey according to the language.

"Of these two constructions, the most reasonable is that adopted by the Lord Ordinary. There is an exception of part of the moveables from any conveyance, or direction to convey, to William Bowie and his heirs. What could be the meaning of that, if the effect of the trust was just to make an immediate conveyance to him of the fee? The trustees, therefore, when

they did convey, were to do so in such a manner as that the father should only have a liferent, while the children got the fee, by putting in the word 'allenary,' or some equivalent expression."

ROSS  
v.  
KING.  
1847.

LORD FULLERTON.—"I am of the same opinion."

LORD JEFFREY.—"I also substantially concur. I was a good deal perplexed at first with regard to the case; but on consideration, I have come to be satisfied that the interlocutor is right. It may be very true that the trustees are bound to convey in terms of the trust-deed; but I don't think they are more bound to convey in virtue of that clause, adjoined to the broad specification of the parties for whom they were to hold, than they would be without any such clause. All trustees are bound to convey when the trust purposes are ended; and the question just is, what were they instructed to do?—what interests were they intended to protect?"

"It is not denied that, if it were not for the addition of that superfluous clause, which does not qualify the legal impress of the truster's appointment—if this were on all-fours with the case of Seton, where there was merely a direction to hold—the father, entitled to claim the liferent, would have been entitled to no more, and the fee would remain with the trustees for the fiars. The obligation to convey is therefore the only point. It was taken for granted in argument that the demand, if ever made to any purpose, must have been a demand on the trustees to denude out and out. It is now quite established that the trustees may hold the fee themselves, and are entitled to make a separate feudal conveyance, and grant infestment to the liferenter, simply in the liferent. They may hold till the conveyance of the fee exhausts the trust. I don't deny that these trustees are bound to convey, in terms of the order to do so. They must convey to each what is due to each, when the proper time has come; but they are entitled to refuse to a mere liferenter everything but a liferent; and as to the fee, they must hold it. They save all the difficulty, they avoid all the perplexing capes and reefs of feudal navigation, by keeping the fee in their own hands."

LORD FULLERTON.—"We decide that William Bowie has only a liferent."

LORD MACKENZIE.—"We do not decide whether the rule as to liferent and fee applies to the more remote destination."

1. In the case of *MEIN v. TAYLOR*, June 8, 1827, and affirmed in the House of Lords February 23, 1830, lands were conveyed to the granter's three brothers, but under the express provision and declaration that they were conveyed "under the burdens and conditions underwritten, and that the said subjects shall be held by them in liferent, and belong to their children in fee, in the proportions after specified." After providing for payment of the granter's debts, and a provision to his wife, the deed thus proceeded:—"Under these burdens my said subjects shall be held by my said disponees, in the proportions and on the terms and conditions following, viz.: my said disponees shall divide the same into twelve equal shares or parts, and I hereby appoint that four and one-half of these shares shall be held by the said James Taylor in liferent, during all the days and years of his lifetime, and at his decease the fee and property thereof shall be divided among the children lawfully procreated of his body, as follows, namely, one equal share to each of his sons, and one equal share to each of his daughters, Mary Taylor and Ann Taylor, to be divided equally among them, declaring that the survivors or survivor of my said disponees shall see the share devised to the said Mary Taylor and Ann Taylor equally divided betwixt them, and the half belonging to the said Mary Taylor secured to her in liferent, and to her children equally among them in fee, and

the other half secured to the said Ann Taylor, and to her children equally among them, in fee." James Taylor, the father, became bankrupt, and the trustee on his estate brought an action of declarator, to have it found, that although *ex facie* of the deed the father was only a liferenter, yet as the fee was granted to his children *nascituri*, it vested in him by virtue of law. In defence, the children PLEADED—That their father, as one of the four trustees, held the fee in trust for them, and that he had no beneficial interest under the deed, except a bare right of liferent.

2. LORD COREHOUSE, Ordinary, sustained the defence, and in a Note observed,—“When a conveyance is made to one in liferent, and his children unnamed or unborn in fee, it is settled law that the fee is in the parent, and that the children have only a hope of succession, to prevent the infringement of the feudal maxim, that a fee cannot be *in pendente*. It is perhaps to be regretted that the point was so settled, because the plain intention of the maker is in consequence often sacrificed to a mere form of expression; and the feudal maxim might have been saved by supposing a fiduciary fee in the parent, as is done when the liferent is restricted by the word *allenary* or *only*. Upon this point, however, it is too late to go back; but certainly the principle ought not to be extended to cases which have not yet been brought under it. In the present case, the subjects are not disposed

to the Messrs. Taylor in liferent, and their children in fee, but, on the contrary, to the Messrs. Taylor in fee; because the obligation to infest is in favour of them and their heirs and assignees. The question therefore is, Whether the fee so given is absolute or qualified?—a question to be determined by the ordinary rules of construction. It appears clearly that it is a qualified or fiduciary fee, because it is granted under certain burdens and conditions. The disponees are required to divide the property into twelve equal shares, four and a half of which are to be held by James Taylor in liferent, two by Thomas Taylor in liferent, one by Robert in liferent, and four and a half by William in liferent; and it is declared, that at the death of each liferenter his share or shares shall belong to his children. The mode of division is also distinctly pointed out. In the case of James Taylor, who had children in existence, the disponees, or the survivor or survivors, are specially directed to divide the shares of the two daughters, who are named, equally betwixt them, and to secure them to the ladies in liferent, and their children in fee; and particular directions are also given with regard to the division of the shares of Robert Taylor and William Taylor; all which implies that the disposition to the Messrs. Taylor is a trust to enable them to execute certain purposes. But where a fiduciary fee is given to a person, and it is directed that he himself shall enjoy the liferent, and still more

clearly when a fiduciary fee is vested in several persons collectively, and the survivor or survivors, and each of them separately, is to have a liferent, such liferent must be construed a naked usufruct, in the same manner as if it had been qualified by the word *allennarly*. See the case of *Seton* against the Creditors of *Hugh Seton*, March 6, 1793."

3. The trustee having reclaimed, the Court "Adhered." LORD PRESIDENT HOPE observed,—“I never was clearer in any case, and do not wish to hear the counsel for the defenders. James was one of four trustees. The conveyance was taken to them in that character, and for various purposes. One of these purposes was, that four and one-half shares should be held or enjoyed by James in liferent, and by his children in fee; then, after his death, it is declared that the trustees shall proceed to divide them among his children in certain proportions. The fee, therefore, never was in James, but in the trustees, and will continue to be so till his death, when the shares must be divided in the mode pointed out. It is impossible, therefore, to maintain that the fee is vested in James.” LORD CRAIGIE was desirous to have heard the counsel for the defenders; but the other Judges having declined to do so, he observed,—“From the terms of the deed, everything thereby conveyed was vested in the four brothers. If they had no children, then the fee would belong to them, so that the vesting

of the fee would be dependent on the existence or non-existence of children. But in such cases it has been settled that the fee vested in the parent, and that the children had a mere *spes successionis*." LORD BALGRAY was of a different opinion, and observed,— "The conveyance was to the four brothers as trustees. They were therefore trustees for the respective rights of liferent and fee provided for by the deed ; and consequently the fee could not vest absolutely in James, but only as one of four trustees." LORD GILLIES concurred in the opinion of the Lord Ordinary, and observed,—"It was no doubt true that the fee was conveyed to the four brothers ; but that was under a declaration that they were to hold it in trust for various purposes, among which it was provided that each of them was to have a liferent, and that the children should have the fee. Besides, the trustees were to divide the shares in certain proportions among the children after the death of James, shewing clearly that they were to be held in trust for them ; and it was also declared that this should be done by the survivor or survivors."

4. The pursuer having appealed to the House of Lords, it was "Ordered and Adjudged that the interlocutors complained of be Affirmed." In the course of the argument of the second counsel for the appellant, it was PLEADED,—"It is an established principle in the law of Scotland, that where a liferent is vested in the parent,

and the fee destined to children, either unborn or unnamed in the deed, the right of fee is held to be in the parent, and the children have only a hope of succession. If, however, the taxative word 'allenary' or 'only' be introduced, the interest of the parent is reduced to a bare usufruct, and the fee is fiduciary in him for behoof of the children. This has been fixed by a series of decisions." LORD CHANCELLOR LYNDHURST.—"You do not mean to argue that there is nothing except the word 'allenary' that could produce that effect?" COUNSEL.—"No, my Lord ; but still the rule of law is important in considering what other expressions, apparently conveying a mere liferent, have been held to amount to the conveyance of a fee." LORD CHANCELLOR.—"This case seems to have been decided on the ground of the fee being a fiduciary fee. It is most material to meet the case on that ground. It is the one on which Lord Corehouse decided. Not that the facts were precisely the same in this case as in the case which he cited ; but he extracted the principle of that case, and applied that principle to the facts of this case. It came afterwards before the Court of Session, and was there decided on the same principle ; and therefore the material inquiry is, whether the judgment can be supported on that ground. The general rule of the Scotch law on this subject seems very clear and distinct." COUNSEL.—"We shall adopt the suggestion of your Lordships, and,

refraining from saying anything more on the rule of law, shall only further inquire, whether this is a deed so expressed as to come under the operation of the case of Seton. The soundness of that decision we do not dispute; but it was a case of direct trust. The present deed, however, is neither in form nor terms a trust-deed. On the contrary, it possesses all the qualities of a simple disposition. The property being *cumulo*, and the four brothers constituted joint fiars, a division was necessary: accordingly, the property is conveyed to the four brothers, for the purpose of being divided in manner underwritten. But to divide implies to convey; and the instant that there is a division and conveyance, the joint labour of the four brothers ceases. Even, therefore, if they divided and conveyed *qua* trustees, that trust expires with the act of division. But the property being divided, what are the interests of the parties? The deed says, the properties are to be held in manner underwritten:—the shares ‘shall be held by the said James Taylor in liferent,’ not that the disponees are to hold for James Taylor in liferent. Now if, as is clear, the testator had disposed directly to James Taylor in liferent, and to the children in fee, the fee would have been in James; why should any other conclusion follow, where the testator disposes to four disponees, directing them to convey in liferent, &c.? Even if the testator intended otherwise, his intention cannot be permitted to disturb a fixed rule of law.

But the manner in which he uses the word ‘descendants’ implies, that he considered the children took as heirs, and not as trust-disponees to the four brothers.” LORD CHANCELLOR.—“Are there any precise words necessary by the law of Scotland, for the purpose of creating a trust-deed? Is it not sufficient, if you collect from the whole tenor of the instrument, that the property is conveyed in order that certain things may be done by the parties who are grantees and feoffees? Does not that make them trustees according to the law of Scotland as well as of England? Does not this deed, under the burdens, provisions, and declarations, and for the purpose of being divided and held in manner therein and herein underwritten, give, grant, assign and dispoise, and so forth?” COUNSEL.—“Very true; but if there be a trust at all, it expired when the division among the brothers took place. Then the brothers became fiars.” LORD CHANCELLOR.—“I ask this for information: A certain number of shares are to be held by Taylor in liferent, what is there to prevent the fee being still in the trustees? Then, at the death of James Taylor, he, holding in liferent, something further is to be done: at his death the fee of the property is to be divided among the children lawfully procreated of his body. Is there anything inconsistent with the law of Scotland, (certainly there is not with the law of England,) in the trustees having the fee, and James Taylor the liferent?” COUNSEL.

—" Nothing, my Lord, if the party express himself in an apt and legal form." LORD CHANCELLOR.—" Then the fee is not *in pendente*. The case is very clear:—The testator says, ' the survivors of my said disponees shall see the share devised to Mary Taylor and Ann Taylor equally divided between them ;' and when it is said, ' at his death the real property shall be divided,' that imports that it is to be divided by the trustees. But if there be a trust continuing during the life of James Taylor, how can the fee be said to be *in pendente*?" COUNSEL.—" If that be your Lordship's view of the import of the deed in question, it will be difficult to oppose the judgment." LORD CHANCELLOR.—" I have been of that opinion from the beginning. Mr. Brougham argued the case extremely well and fully in all its points except this ; he passed it over very gently. I was glad to hear his dissertation on the law ; but by passing over this point so lightly, he confirmed me in my opinion, and satisfied me that he felt as I felt. Although this is not a formal trust-deed, I consider it to be one substantially. In the case of the creditors of Frog, which has been referred to, a legal subtlety prevented the fee vesting in the children *nascituri*. That is avoided here by the appointment of trustees. I consider that the trust, as far as relates to the fee, remains in the trustees, and the liferent in the particular individual, James Taylor. Under these circumstances, it is quite unneces-

sary to apply the general rule ; and this seems to have been the ground upon which the case was decided below. That is my opinion as one of your Lordships ; and if the rest of your Lordships are of that opinion, we may save time and go no further."

5. In the case of *SCOTT v. NAPIER*, February 14, 1826, and affirmed in the House of Lords May 14, 1827, a party sold his estate to his son-in-law, under burden of the price payable at certain stipulated periods ; but with regard to one portion of the price, it was declared that during the seller's life no interest should be payable, and that the principal sum was to be secured to the son-in-law and his wife in manner following, viz. :—" The interest of the said sum is to be liferented by the said William Scott and Mrs. Magdalene Scott, his spouse, during their lives, and during the life of the survivor of them, and the said principal sum of £10,000 to be the property of and divisible amongst the issue of the marriage, male and female, as their said parents may jointly direct by any settlement under their hands, and in default of such direction, amongst the said issue as the survivor may direct by deed or will ; and in default of issue, as the said Mrs. Magdalene Scott may direct under her own will or settlement." A competition arose between the children of Mr. Scott and Mr. Napier, the assignee of Mrs. Scott, when the Court found " That the fee belonged to the children." LORD BALGRAY observed,—" The



£10,000 clearly belongs to the children, and not to Mrs. Scott. The words of the deed are very remarkable, and it is impossible to peruse them without being satisfied that it was the intention of Mr. Glendonwyn that the £10,000 should belong to the children, and not to their parents. Indeed he expressly limits their right to the interest; and he further states that this interest is to be liferented by them, which is quite exclusive of the idea of vesting a fee in them." LORDS HERMAND and CRAIGIE concurred. LORD GILLIES observed,—“I am of a different opinion, and it seems to me to be impossible, in consistency with the former decisions, to hold that the fee is in the children, and not in the parents. The deed expressly bears that the money is to be secured to Mr. and Mrs. Scott, and failing issue, that it is to be at her disposal. Some stress is laid on the word ‘property;’ but it has been repeatedly held that a conveyance to parents in liferent, and children in fee, does not vest the fee in the children. But the word ‘property’ is not stronger than ‘fee.’ If a trust had been created, the case would have been different; but this was not done, and, on the contrary, a right of disposing of the £10,000 was, in a certain event, bestowed on Mrs. Scott.” LORD PRESIDENT HOPE observed,—“I concur with the majority of the Court, and I am not disposed to extend the subtleties of the feudal law to cases such as this. Indeed I have always thought that

it was contrary to principle to apply that law to money provisions. The intention, however, is perfectly clear in favour of the children; and the words of the deed exclude the application of the feudal principle on which Lord Gillies rests his opinion. There is no conveyance to the parents and children in fee and liferent; on the contrary, the interest alone is given to the parents, while the subject out of which that interest is to be paid is conveyed to the children.” The assignee of Mrs. Scott having appealed to the House of Lords, “It was Ordered and Adjudged that the interlocutors complained of be affirmed.”

6. In the case of HUTTON’S TRUSTEES *v.* HUTTON, February 11, 1847, a truster directed his trustees to pay four shares of the residue of his estate to Peter Ferguson, senior, in liferent, for his liferent use allenary; and at his death, to pay one share and a half to Elizabeth Ferguson, in liferent, and to her lawful children in fee; another share and a half to Peter Ferguson, junior, in liferent, and to his children in fee; and the remaining fourth share to be divided into two equal halves, one of the said halves to be paid to Mary, and the other to Catherine Ferguson, and to their several children, in case of their death, equally, share and share alike, in fee. The trust-deed declared that it was the intention of the truster that the sums made payable to Helen Hutton, Elizabeth Mary, and Catherine Ferguson, should

be secured for their own proper use and behoof. The deed farther declared, "In all events, it is hereby declared that the same are alimentary, and shall noways be affected by their debts or deeds, or by any diligence to be used by their respective creditors; and for the same reason, the *jus mariti* and all right of administration competent by law to any future husband of the said Janet Ferguson, and to the present or future husbands of the said Helen Hutton, Elizabeth Ferguson, Mary Ferguson, and Catherine Ferguson, is hereby expressly excluded: And it is hereby declared, that the subjects and effects so conveyed, and sums so made payable to them respectively, as aforesaid, shall not be affectable by the debts or deeds, legal or voluntary, of such husbands, nor by the diligence of their creditors, and that the acts and deeds of the said Janet Ferguson, Helen Hutton, Elizabeth Ferguson, Mary Ferguson, and Catherine Ferguson, respectively, shall be as valid and sufficient thereanent, as if their said several husbands had given consent thereto." On the death of the truster, the question was raised, Whether, on a construction of the trust-deed, the directions to the trustees to pay the shares of the residue therein mentioned to the claimants, Peter Ferguson, junior, and Mary and Catherine Ferguson, the son and daughters of Peter Ferguson, senior, and to their children in fee, vested in them a right of fee, or only of liferent, in these shares?

These parties were without children, and unmarried. The Court Found, "That the interest vested by the deed libelled, in the children of Peter Ferguson, senior, was a right of fee."

7. LORD JUSTICE-CLERK HOPE observed,—“I am of opinion that the interest which emerged at the death of Peter Ferguson, senior, is a right of fee in the claimants. There is no provision for the continuance of the trust after the death of the said Peter Ferguson. The direction is—at his death, or, if he predeceases the longest liver of the spouses, to pay at once over to the claimants the shares intended for them respectively. It is a proper direction to pay at that event. The funds are then to be divided and paid over. The trustees would not be entitled to continue the trust, or to hold the funds. Neither is there even any direction that the trustees are to invest the shares in such a way as may be said to vest only a liferent in the claimants. On the contrary, the only direction is to pay over the funds. Neither does any difficulty arise from the use of the same term ‘to pay’ to Peter Ferguson, senior, for in his case it is said expressly, for his liferent use allenary, and the proper mode of executing such direction is to give him only the life interest of the funds. When a liferent was intended, we thus see that the makers of the deed used the appropriate and technical terms to constitute a liferent, by introduction of the terms, ‘for his liferent use allenary.’ There are other

parts of the deed confirming the same conclusion—as, for instance, the declaration that the sums made payable to the claimants and one of the Huttons (putting both too on the same footing), shall be alimentary, and not affected by their debts or the debts of their husbands, which shews that the trust was then held to be at an end. As to the interest of the claimants, the terms employed, according to their settled and fixed interpretation, give beyond doubt a fee to the claimants. Other expressions and separate provisions in the deed might have controlled the terms so employed. But there are no such declarations or provisions, and hence I must give to the terms employed their ordinary meaning. The cases referred to, are all cases in which a trust was expressly constituted for the purpose of maintaining a fee for the children, and the direction to execute the trust was only on the death of the liferenter. It is very true that the expressions in the deed, as to the shares for the Huttons and for the Fergusons, are different, but that consideration is not of itself sufficient. We often see the phraseology varied without any reason, and where the legal result must be the same.”

8. LORD MONCREIFF observed,—“ I am of opinion, that in this case the provision of the trust-deed for the disposal of that portion of the residue of the estate appointed by the post-nuptial contract and mutual settlement to be paid to the relations of the wife, Janet Ferguson, on the

failure of Peter Ferguson, her father, is so conceived as to carry, in legal construction, a right of fee to the four persons named, viz., Elizabeth Ferguson, Peter Ferguson, Mary Ferguson, and Catherine Ferguson, according to the proportion specified in the deed. The appointment is, that the trustees shall pay, in the first instance, the four shares which are here in question, ‘ to Peter Ferguson, father of the said Janet Ferguson, in liferent, for his liferent use allenary.’ Under these words there was no fee vested in that Peter Ferguson; and the remainder of the clause must be taken as disposing of the fee of those four shares, by appointing that at his death the trustees shall pay one share and a half ‘ to Elizabeth Ferguson, sister-german of the said Janet Ferguson in liferent, and to her lawful children, equally and share and share alike, in fee.’ And so in the same terms, one share and a half to Peter Ferguson, &c., and the remaining fourth share to be divided into two equal halves, and one of said halves to be paid to Mary Ferguson, and the other to Catherine Ferguson, in precisely the same terms, that is, ‘ in liferent, and to their several children in case of their death, equally and share and share alike, in fee.’ These four persons are *nominatim* donees according to the terms of the appointment; and there is no farther destination or appointment after their children, to render the further subsistence of the trust necessary, after the death of Peter Ferguson

the elder. The only other provision which appears to be material, is that which excludes the *jus mariti* in regard to Elizabeth, Mary, and Catherine Fergusons, and declares 'that the acts and deeds of the said Elizabeth Ferguson, Mary Ferguson, and Catherine Ferguson, shall be as valid and sufficient thereanent, as if their said several husbands had given their consent thereto;' a provision which tends strongly to fortify, with reference to the intention of the testators, the legal construction otherwise deducible from the words of destination. Having a very clear opinion on the present case as it stands, I do not think that it would be useful to go into the details of the arguments derived from other cases. The general principle being, that we must look to the intention of the maker of the deed, in so far as it may be expressed or distinctly indicated by the terms employed in all the clauses, it necessarily must be, that the result may be different in different cases, from the necessity of construction of various forms of expression. But I have always understood it to be a clear rule generally, that, if there be a destination to a father or mother in liferent, and to his or her children *nascituris* in fee, the fee is by construction of law vested in the father and mother, and the right of the children, when they come to exist, is merely a *spes successionis*; unless there be other clauses in the deed, expressing, or by necessary implication establish-

ing, that the intention was different. See Lord Ivory's Note, Ersk. iii. 8, 36. And I am not of opinion that the existence of a trust, however material in other circumstances, makes any material difference on such a simple case. It is unnecessary to go into the particular cases in which it has been held that this general rule of construction is necessarily controlled and overruled, either by the use of other terms in the appointment itself, such as 'for liferent use allenarly,' added to the provision for the father in liferent, or an existing child being named in the appointment of the fee, as in the case of Mackintosh, Jan. 28, 1812, or by other clauses in the deed. For in the present case, though there are other clauses which tend to confirm the legal construction of the terms themselves, there is nothing either in the form of the provision itself, in the nature of the trust, or in any other clause, having the least tendency to shew that there was any intention adverse to that construction. On the contrary, I think it very clear that the intention in this case was, that the fee should be vested in the four persons named. I think that it was vested from the death of the longest liver of James Hutton and Janet Ferguson. But it is enough, that, at the death of Peter Ferguson, sen., it became fully vested, unburdened with his liferent."

9. In the case of CAMPBELL v. CAMPBELL, May 30, 1843, Charles Campbell conveyed his estate to trustees by trust-disposition and

settlement, with the following directions:—" *Fourthly*, As it is my wish and desire that my estate of Leckuary remain in my family, I direct my said trustees, and survivor of them, in the event of my having a son procreated of my present marriage who shall attain to the age of twenty-five years complete, and be in every respect capable of managing his own affairs, to dispoise, convey, and make over to him, at his attaining said age, the foresaid estate of Leckuary, burdened, and qualified, however, in such a manner as it shall not be in the power of my son to sell or dispose of the said estate during his life, but he shall only be entitled to the liferent thereof; and failing of him by decease, without leaving lawful issue of his body, that then the said estate shall return to my eldest daughter, if in life, and failing thereof to her children; whom failing, to my second daughter, and her heirs;—and as the said estate is burdened with the payment of £50 sterling yearly to Mrs. Young, my aunt, I appoint the surplus rents to be applied for the behoof of my whole family, until the succession of my said estate opens up to my son or daughter, as before and after mentioned. *Fifthly*, In the event of my having no son procreated of my present marriage, I direct and appoint the said estate of Leckuary to be made over in the foresaid manner, and under the foresaid burdens and qualifications, to my eldest daughter, upon her attaining the age of twenty-five years, or being

lawfully married, whichever of these events shall first happen; and failing her by decease, and without leaving lawful issue of her body, then I direct the same to be made over to her immediate younger sister, under the said burdens and qualifications; and failing her also by decease, without leaving heirs of her body, then to my youngest daughter, and the heirs of her body."

10. Mr. Campbell died, leaving four daughters, but no son, and in 1842 his widow, the only surviving trustee, by a disposition, proceeding on the narrative of the trust-deed and full recital of the fourth and fifth purposes, conveyed the estate of Leckuary to the eldest daughter, Mrs. Isabella Campbell, spouse of Major Neil Campbell, under the declaration that it was "burdened and qualified in terms of the before recited trust-disposition and deed of settlement." Mrs. Campbell then, with consent of her husband, brought an action, concluding to have it declared that she was absolute proprietor of the estate of Leckuary, and as such was entitled to sell it and apply the price to her own purposes. In this action she called her own children and her sister, and their children, as defenders, along with her mother, her father's only surviving trustee. In support of this action she PLEADED,—That there was no proper substitution of any one to her, but a mere direction to the trustees to convey the estate to others, in the event of her predeceasing without issue the term

appointed for their conveying it to her. In conveying to her, therefore, the trustees could not, in accordance with the directions of the truster, execute any deed which could have the effect of limiting her absolute right of fee. If they executed an entail, the pursuer would be the last as well as the first heir of entail, and therefore unfettered. The defenders PLEADED,—That the intention of the truster being obviously to keep the estate in the family, and to give the pursuer a mere liferent, the trustees were bound to carry it into effect. LORD WOOD, Ordinary, repelled the defences, and decerned in terms of the libel.

11. The defenders having reclaimed, the Court pronounced the following interlocutor:—"In respect by the conception, and according to the true meaning of the purposes and directions of the trust-deed, the pursuer has a liferent only in the estates in question: Alter the interlocutor of the Lord Ordinary, and assoilzie the defenders from all the conclusions of the libel." LORD MACKENZIE observed,—“The first principle is this, that as there is here a trust, we must give a fair interpretation to the will of the truster. We are not to apply to this deed that sort of malignant interpretation that is applied to entails. The trustees are not entitled to interpret strictly, if by so doing they defeat the manifest intention of the truster. If, then, the trustees are entitled to look for the true will of the truster, they are bound to give effect to it. Now,

what was his intention? In the first place, it is clear that he meant the estate should remain in his family. He then goes on to make provision, that, if he shall have a son—(his Lordship read the fourth purpose of the trust.) He here states the burdens and qualifications that shall be on a son if he have one. The grant to him is of nothing but a liferent. The words are clear. It is said that the fee is not given to any one; but, with a fair interpretation, there can be no doubt that the fee was to go to the children of the son. The deed provides, ‘that failing him by decease without leaving lawful issue of his body, that then the estate shall return to my eldest daughter,’ &c. ‘Return to’ is an odd expression. What I think is meant is, that the bringing in of the son, if he should happen to have one, was a postponing of the daughters; but if he should die without issue, then they were to stand as they did before. It was plainly meant, however, that if there had been a son, he was to have the liferent; and that, failing his issue, the estate was to go to sisters. It is plain by implication, that the fee was to go to his children if he had any. Therefore, if there had been a son who had children, and he had demanded a conveyance in fee simple, his children would have been entitled to object. Having got this length, we come to the actual question, which falls under the fifth purpose. Now, this is just a repetition of the fourth, applicable to the event that has happened.

It is a substitution of the eldest daughter to the son, under the same burdens and qualifications, which are, that she should be the liferenter only, and that the estate should nevertheless vest in her, so that her sister, who is substituted to her, should not succeed, in the event of her having issue of her own body, implying that her children should be fiars. We must give the same interpretation to this that we would have done to the fourth purpose. I do not think it necessary to consider the later rights of the other daughters."

12. LORD FULLERTON observed,—"I am of the same opinion. This question has arisen under the fifth clause alone, but that clause imports into it all the burdens and qualifications imposed on the son in the fourth. Now, what are these burdens and qualifications? (His Lordship read those imposed upon the son in the fourth clause, observing that they limited his right to a liferent.) Here then is a trust, directing that in a particular event the estate shall be made over to the truster's eldest daughter, but that she shall only have a liferent. There might be a difficulty, if the direction to the trustees were to be considered as one to execute a kind of entail; but I do not think that difficulty arises here. Where the fee may

be, and how it may be dealt with afterwards, may be a difficult question. I think the trustees should only give the pursuer the liferent, reserving the fee till it shall be seen whether she has children."

LORD PRESIDENT BOYLE.—"This is a question of intention. We are not fettered by the strict rules applicable to deeds of entail. We are to make out the purpose of the truster. Now, looking to the deed, I have not been able to see that, in the fourth clause, anything more was meant to be conveyed to the son, who was the most favoured party, than a liferent. The words are plain—'he shall only be entitled to the liferent thereof.' The word 'only' is as effectual as 'allenary.' This is the first thing to be settled, though the case arises under the fifth clause; for how is that clause worded?—(His Lordship read the clause.) Now, I cannot extract from this, that anything more was meant to be given to the daughter than to the son, viz., a liferent. We cannot anticipate any questions with regard to the fee, for no such questions are raised before us; but in the question, whether the trustees are to make over the estate to the pursuer in fee, I think we must alter the interlocutor of the Lord Ordinary, and ordain them to convey in liferent only."

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*A Conveyance by a Parent to himself in liferent, and to his child nominatim in fee, imports a fee in the child.*

M'INTOSH v. M'INTOSH.

Jan. 28, 1812.

NARRATIVE.

GILBERT M'INTOSH having purchased a house, took the conveyance of it to himself and his wife, and the longest liver of them, in liferent, and Janet M'Intosh, their daughter, her heirs and disponees, in fee. Infestment *more burgi* was taken upon the disposition, in terms of the precept—the Bailie delivering to the parents “liferent state and sasine,” and to the daughter “heritable state and sasine.”

The wife having died, the husband married a second time, and afterwards sold the subject. The daughter thereupon raised a suspension and interdict to interrupt the sale, and afterwards insisted in a reduction and declarator against her father and the purchaser.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—Where a person conveys an estate to himself in liferent, and to his son *nominatim* in fee, or takes the conveyance of any subject in these terms, and reserves no power of altering or revoking the deed, or of burdening the estate, he as clearly expresses his intention of vesting the estate in favour of his son as any deed or words can do. If he keep the deed in his own custody, it will be in his power to alter it. But if he deliver it to another person, or what is still more decisive, has an infestment taken in favour of the fiar, and has that infestment put upon record, he then makes the right of the fiar a public right, which must form a part of the progress in any titles which may afterwards be made up.

ARGUMENT FOR  
DEFENDER.

PLEADED FOR THE DEFENDER.—Presumed will or intention is the foundation of all the rules that are applied in construing deeds granted by parents to children. No man is presumed to intend to divest himself of his property by a deed that is purely gratuitous, in favour of his children. Where a deed by a parent in favour of his children is not executed *intuitu matrimonii*, so as to give it an onerous character, it ought to be held



as a settlement *mortis causa* among the children, and the father ought not to be presumed to denude of the right during his own life.

M'INTOSH  
v.  
M'INTOSH.  
1812.

LORD ROBERTSON, Ordinary, pronounced the following inter-locutor:—"In respect the subjects were purchased with the money of the defender, Gilbert M'Intosh, and that the disposition which he took in favour of himself and his wife in liferent, and of his daughter, the present pursuer, her heirs and disponees in fee, was entirely gratuitous as to her, and that there is no reason to presume that it was the intention of the father to divest himself during his own life, finds that he must still be held as the *fiar* ; and, therefore, in the suspension and interdict, repels the reasons of suspension, and recalls the interdict ; and in the reduction, sustains the defences, assoilzies the defenders, and decerns."

Dec. 18, 1810.

The pursuer having reclaimed, the Court "Altered the inter-locutor of the Lord Ordinary, and reduced the sale."

JUDGMENT.  
Dec. 6, 1811.

The defender having now reclaimed, and pleaded that the fee was constructively in the father, the Court "Adhered."

Jan. 28, 1812.

LORD MEADOWBANK observed,—“It does not appear to me that there is any doubt in this case. All the former cases of liferent and fee, &c., were argued by both sides, on the supposition that the *nominatim* disponee takes the fee. Was there ever a doubt that the fee goes where it is desired to go, where the granter expressly gives it, and the grantee is capable of holding it? In the case of Newlands, which was just a disposition to a person in liferent for his liferent use *allenary*, and to children *nascituris* in fee, where lay the difficulty? The grantee of the liferent had no fee according to the will of the donor. Now, where in that case was the fee? Was it *in hæreditate jacente*? That would have been the old notion. The answer, however, was ‘No;’ the disposition gives all away from the disponent to a set of heirs. But there was no substantial fee conferred on any person existing. The liferent there is the only substantial interest conferred on any person in existence.

OPINIONS.

M'INTOSH  
v.  
M'INTOSH.  
1812.

There is indeed a fee granted away to a donee *in spe*; and as the only grantee in existence is the liferenter, he is held to be also constructive fiar in trust for the grantee *in spe*. It was the want of a grantee in existence, and capable of taking the fee, which palpably created the whole doubt, and made way for a constructive fee.

“The case of *Gerran v. Alexander* was much discussed in the case of *Newlands*; and the account given in the report of the former case of the Lord Justice-Clerk Braxfield’s opinion, as if a fee might be *in pendente*, possibly led him to hold up the doctrine of the law the more explicitly, in order to cure the misconception of the reporter. I had occasion to write in the case of *Newlands*; and I found it difficult to shew how the fee was disposed of in the interim; and, therefore, I endeavoured to shew that a fee might be *in pendente*, and quoted the case of *Rosehaugh*, where the fiar was not born at the death of the disponent, and the Court had allowed the next heir to serve. Where, in the interim, was the fee there? When the true fiar was born, he compelled the interim fiar to denude. I remember a great deal of argument was used as to where was the fee. The law finds it so impossible to do without a fiar, that it must have an interim fiar. There must be a fee somewhere.

“In short, all the cases were obviated by my Lord Justice-Clerk. He thought it necessary to state the matter fully; and as I took notes of his speech, I will read it in his own words:—‘Clear a fee cannot be *in pendente* in the idea of the law. It may be in the *hæreditas jacens*, i.e., have remained with the donor, where it is sufficiently safe, as it cannot be lost by the negative prescription, and may be taken up by the destined fiar, or his representatives, at the distance of centuries. The law admits of this sort of pendency of the fee, while remaining *in hæreditate jacente*; and there the superior has his feudal remedies. In all other cases, the fee cannot be *in pendente*; and as to the principle, there is no difference between fees of land and fees of money. Grants under suspensive or defeasible conditions suggest no difficulty in ascribing the fee. Taking then the rule that a fee cannot be *in pendente*, as universally applicable to cases like the present, and that the maxim, *uti quisque legasset, &c., ita jus esto*, is the general rule of law, I think the Court

M'INTOSH  
v.  
M'INTOSH.  
1812.

have put a natural construction on the grants that have been the subject of the decisions. We must construe the deed on these principles : *First*, The donor has given away the whole from himself. *Secondly*, Must presume he knows fee cannot go to a person not existing. Then he must mean to give the fee to an existing person. Now, what does he mean here ? Apparently gives it to people not capable of taking. (The gift, you observe, is to parent in liferent, and to children unborn in fee.) He means to give at the time no substantial right beyond liferent. But, presuming that he understands the law, he must then mean to give a nominal fee for behoof of the children. Now, is it not lawful for him to create merely a substantial liferent ? Trustee cannot create debt on the trust-estate. But suppose a man to dispoise to his son for liferent use alienably, and to provide that no fee is to be vested in him fiduciarily, or otherwise, what is the consequence ? The only consequence is, that the fee must remain with the disponer. The will of the granter is the rule ; and you are not, from any idea of *necessitas legis*, to construe the grant contrary to his will. No question in the case of Baltilly, whether the creditor in the heritable bond would not have been a good personal creditor.'

" In the course of the deliberation, his Lordship was twitted with the idea that fiduciary fees implied a substantial fee somewhere, which of course could not be *in pendente*, and might be affected by the fiar ; and he spoke in a kind of reply, which was not very common with him.

" ' Fiduciary fee said to imply a substantial fee somewhere. But I take that to be inaccurate. Many estates in England, and some in this country, are held in trust for the heirs of marriages. If the substantial fee must be in the trustees till the birth or succession of those heirs, it will follow that the trustees might spend the estate. The fact is, the only existing fee stands in the nominal fiar. But there is a *jus crediti* qualifying the right on the face of it, and that may be *in pendente*. Said farther, there must be formalities of Act 1685 to restrain ; agree, if a fee for man's own behoof. But here there is nothing given to the fiar. The *jus crediti* is established in the child ; that absorbs the beneficial interest. Cannot help saying, before I conclude, what Lord Eskgrove has already said, that ever

M'INTOSH  
v.  
M'INTOSH.  
1812.

since I knew anything about law, liferent only is understood to be granted ; and I hold it most dangerous to stretch principles to cut down established rights. A thousand estates in Scotland held on this destination.'

" That was the opinion of this very learned Judge on these different doubts.

" Now, my Lords, if all these difficulties arose from the want of a *nominatim* fiar, then your Lordships have no difficulty in your way here. If, indeed, the defender had kept this disposition in his own hands, and given it back to the seller, or destroyed it, and taken a new one in another form, we would have held differently ; for we should have held in that case that it was only an intended fee. But when a man expedes an infestment, he has no more right over the grant."

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*Where a Parent conveys to himself in liferent, and to his child nominatim in fee, or takes a conveyance from another in these terms, but reserves to himself power to alienate and burden, the substantial fee is in the father, and that in the child is nominal merely ; but if the reserved power to alienate is not exercised, the child takes as dispositive, and does not require to be served heir to his father.*

#### I.—CUMING v. HIS MAJESTY'S ADVOCATE.

**NARRATIVE.** IN 1692 Adam Hay obtained a charter to himself in liferent, and to his son Andrew in fee, but reserving to himself a power of contracting debt, and of disposing of the lands, and infestment followed upon the charter. Andrew, the son, predeceased his father, and in 1726 the father conveyed the lands to his grandson, Adam Hay. After the death of his grandfather, Adam engaged in the rebellion of 1745, and the lands were forfeited to the Crown. Christian Cuming, the widow of Andrew, claimed her terce.

**ARGUMENT FOR CLAIMANT.** PLEADED FOR THE CLAIMANT.—Andrew died infest in the lands under the charter of 1692. By the deed of 1726, the

grandfather merely meant to save his grandson the expense of a service to Andrew, the original fiar, and not to recall the fee which had vested in him under the charter of 1692.

CUMING  
v.  
HIS MAJESTY'S  
ADVOCATE.  
1758.

PLEADED FOR THE CROWN.—In virtue of the reserved faculty contained in the charter of 1692, the substantial fee was in the grandfather, and that in his son Andrew was merely nominal. The claimant, therefore, Andrew's widow, has no right to terce.

ARGUMENT FOR  
CROWN.

The Court dismissed the claim.

JUDGMENT.  
Feb. 10, 1756.

## II.—BAILLIE v. CLARK.

James Clark having purchased certain subjects, took the conveyance to himself in liferent, during all the days of his life, and to his son, George Clark, his heirs and assignees whomsoever, in fee. The deed, however, contained a reservation in favour of the father, to burden and affect the lands, and to sell and dispose of them at pleasure, without the consent of his son. On this disposition infeftment was taken in favour of the father and son, in the respective interests of liferent and fee.

Feb. 23, 1809.  
NARRATIVE.

The father never availed himself of his reserved power. On his death, the widow of a younger son, in virtue of a conveyance in her favour, claimed from the elder brother one-half of the whole property left by his father, on the ground that he had taken his share of the executry, and was therefore bound to collate the heritage with his younger brother. The defender denied that he was bound to collate the lands in which he had been infeft, in favour of his father in liferent, and himself in fee.

PLEADED FOR THE DEFENDER.—The defender did not take the subjects in question by succession to his father as heir, but by sale and disposition from the vendor. It is true that the right of fee, conveyed to him by this disposition, was liable to a liferent and reserved faculty in his father, but still it was a fee vested in him *instantly*; and when these burdens ceased, it

ARGUMENT FOR  
DEFENDER.

BAILLIE  
v.  
CLARK.  
1809.

became an absolute fee as if they never had existed. The defender can no more be said to have succeeded to his father as heir, than he could have been said to have succeeded as heir to any body else in whose favour a liferent of this nature had been reserved. He never could be heir in the fee to a person in whom it never was vested. This case is quite different from that of an heir *alioqui successurus* taking the estate by a particular destination, or even by a disposition from his immediate ancestor. For here the defender did not succeed as heir of provision, nor indeed succeed in any way to the right that was in his father.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—It is fixed law that a nominal fee in the heir *alioqui successurus*, and under such qualifications as in the present case imports neither more nor less than a right of succession. In the case of *Murray v. Murray*, July 23, 1678, it was found expressly that an heir taking by disposition must collate. It is impossible to give any reason why a disposition taken from a vendor in the terms in which the disposition in question was taken, should have any different effect from the one made by the buyer himself to his heir under similar qualifications.

JUDGMENT.  
Feb. 23, 1809.

The Court Found, “That the defender must either collate, or must give up the whole of the executry.”

OPINIONS.

The result of the opinions of the Court is thus given in the Faculty Report,—“The Court thought there was not much difficulty in the case. That at first sight the disposition appeared to make the father only liferenter, but the reservation clearly made him fiar. That full property was nothing more than a liferent with a power of disposing at pleasure; and, therefore, a liferent with such power of disposal was full property. That the father had this; and therefore the son, during his life, had nothing at all but a mere chance of succession dependent on his father’s pleasure, which is just the common situation of an heir with a revocable disposition in his favour, reserving his ancestor’s liferent and power of disposal. That such an heir, succeeding by such a disposition, was liable

to collate ; and there was a good reason for it, since, otherwise, in consequence of a change merely in the form of succession, intended only to save the necessity of a service, an heir might run away with the whole heritage, and yet come in for a share of the moveables."

BAILLIN  
v.  
CLARK.  
1809.

1. In the case of *DICKSON v. DICKSON*, December 7, 1780, Dickson executed a conveyance of his lands in favour of his son Alexander, reserving his own and his wife's life rent, and also a power to himself to alter and burden as he thought proper. He afterwards sold the lands, and took a bond for the price from the purchaser, "in favour of himself and his wife, and longest liver of them, in life rent, for their life rent use altogether, and in favour of their son, his heirs and assigns, in fee." The bond, however, expressly declared that it was "without prejudice always to the said James Dickson of suing and using all manner of execution and diligence, at any time in his lifetime, upon the bond, after the term of payment, as he shall see fit ; and of uplifting and discharging the principal sum, annual rent, and penalty aforesaid, notwithstanding he is only provided to the life rent as aforesaid." On the father's death his daughter claimed a share of the bond, in virtue of her right of *legitim*, and pleaded that it was evident that her father did not intend to divest himself of the fee in favour of his son ; that he

had that bond so conceived as to save his son the expense of making up titles after his death, and therefore her right to *legitim* affected the bond, as it remained under her father's power till the last moment of his life, any right which the son had being pendent and defeasible during his father's life. The son *PLEADED*,—From the moment that the bond existed, the fee was in the son, and a life rent only in the father. The clause authorizing the father to do diligence upon it, was properly thrown in, to prevent any difficulty that might arise in the event of it being found expedient, for all concerned, to insist for payment, as the son, being an officer in the army, might have been abroad, and unable to concur in a discharge. The Court Found "That the sum in dispute made a part of the divisible funds, in the present accounting for the pursuer's *legitim*."

2. In the Faculty Report it is stated to have been observed on the Bench,—“As there was no obligation upon the father, in case he should uplift the money, to re-employ it in the same way, the substantial fee remained in him.”

LORD HAILES, in his Decisions, gives the following opinions of the Court. LORD HAILES.—“ The father meant to settle the £600 on his son ; but he has expressed himself in an ineffectual manner. It is probable that he forgot that his daughter still remained a bairn of the house.” LORD BRAXFIELD.—“ When a father lends out money in this way, with power to uplift, and without an obligation to re-employ, the fee in the son is

merely nominal. All his purpose here was to save the expense of making up titles, but his deed has transgressed his purpose.” LORD PRESIDENT DUNDAS.—“ I wish to find law for the heir, but I cannot. This is an exceedingly hard case—the heir gets less than the younger child. But the subject was *in bonis* of the father, and had he forfeited, it would have gone to the Crown.”—*Hailes' Decisions*, vol. ii. p. 865.

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*A conveyance to a husband and wife in conjunct fee and liferent, for the wife's liferent use allenary, and to a child nominatim in fee, imports a right of fee in the father, and on his decease the child must serve to him as heir of provision.*

WILSON v. GLEN.

Dec. 14, 1819.  
NARRATIVE.

IN 1764 a disposition was granted by Isabel and James Black to George Cunningham and Margaret White, his spouse, and the longest liver of them two, in conjunct fee and liferent, for her liferent use allenary, and to Thomas Cunningham, their son, his heirs or assignees, in fee, under the condition and reservation after expressed, conceived in favour of the said George Cunningham.

The reservation was in the following terms :—“ But always with and under the condition, reservation, provision, power, and faculty underwritten, conceived in favour of the said George Cunningham, viz., ‘ That although the foresaid subjects are conveyed to the said Thomas Cunningham in fee, yet it shall be free and lawful to the said George Cunningham, and in his power at any time in his life, not only to set tacks to continue for any space of time, long or short, even after his decease, for payment of such tack duties, great or small, as he shall think proper ; but also to sell, wadset, or dispoñe the said subjects in



WILSON  
v.  
GLEN.  
1819.

whole or in part, either gratuitously or for onerous causes, and to burden and affect the same with infeftments of liferent or annualrent, to be uplifted furth of the same, or to contract debts to the value thereof, and for which the said Thomas Cunningham and his heirs shall be liable, whether such debts shall be due by heritable securities affecting the said subjects, or only by personal obligements, and generally with power to the said George Cunningham to do, use, and exerce all other acts and deeds concerning the premises, which any other heritable proprietor could do, and all without the advice or consent of his said son, or his foresaids, as fully and freely in all respects as if the fee had not been disposed to him."

Infeftment was taken on this disposition in favour of George Cunningham, Margaret White, and Thomas Cunningham, "conform to their respective interests of liferent and fee above mentioned," and a charter of confirmation was obtained from the superior in terms of the disposition.

George Cunningham survived his wife about four years, and at his death in 1784, his son Thomas Cunningham assumed possession, but died without having completed any title, being survived by an infant son only a few days. He had executed a settlement, "to and in favours of the said George Cunningham, my son, and failing of him without heirs procreate of his body, to any other child or children to be procreated of my present or any future marriage, and to their heirs and assignees, and failing of heirs of their bodies, to and in favour of the said Margaret Henderson, my spouse, and her heirs and assignees whomsoever."

Margaret Henderson having been infest on the precept in this disposition, conveyed the subjects to George Glen, her second husband.

Margaret, Isabel, and Helen Cunninghams, nieces and heirs-at-law of George Cunningham, on the footing that the fee was still in *hæreditate jacente* of their uncle, in consequence of Thomas Cunningham having made up no title, proceeded to make up a title in their favour as heirs-portioners of line and provision in special to their uncle. In their service they were opposed by George Glen; and the case having come before the First Division of the Court, it was found, 27th February

WILSON  
v.  
GLEN.  
—  
1819.

1812, that the fee being full, a special service was not the competent mode of making up titles in order to challenge the infestment of another.

William Wilson, shoemaker in Linlithgow, a creditor of Margaret Cunningham, charged her to enter heir in special, and in general special to George Cunningham, her uncle ; and having afterwards (25th January 1814) obtained decree of adjudication, he raised an action of reduction improbation against George Glen, on the ground that Thomas Cunningham, not having a vested right of fee under the disposition to his father and mother, and him, but only possessing on his apparency, the conveyance by him to Margaret Henderson was *a non habente potestatem*.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—Heritable property, when once vested in a person, cannot be transferred but according to certain forms ; and where it is to be transferred from the dead to the living, a special service or precept of *clare constat* is necessary. The term “conjunct fee,” in deeds taken to husband and wife, is fixed and certain, as invariably importing a fee alternatively in the husband or wife, or absolutely to the husband or the wife, as the qualifying words indicate. The fee in the present case was in George Cunningham, as his wife had only a liferent ; and the idea of his having only a liferent is contrary not only to any inference to be drawn from the dispositive clause, which must be the ruling clause, but to the express words of it, and contrary to the whole train of authorities and decisions.

The constitution of a conjunct fee is very different from what occurs in the present case. Conjunct fees are properly co-ordinate, and are held by the several fiars *pro indiviso*. But there is no such anomaly as a full fee in one person, with the uncontrolled power of disposal, and a fee of a lesser denomination in another not accompanied by possession, nor any power of enjoyment or disposal.—Bankton, b. ii. tit. 3, § 116 ; Stair, b. ii. tit. 3, § 41 ; Erskine, b. iii. tit. 8, § 35. A destination to a husband and wife, and the survivor in conjunct fee and liferent, and after the death of the survivor to the son *nominatim* in fee, is held by all the writers to be a subordinate fee. But

that is not a more clear indication of the subordination of the fee than where the right is taken to the husband and wife, in conjunct fee and liferent to the wife, for her liferent use alienably, but to the husband as a fee conferring uncontrolled powers of disposal; for, till the death of the person holding these powers, there can be no fee in the son. He has merely a *spes successionis*. Although George Cunningham may have intended to save to his heir the expense of making up titles by inserting him *nominatim* in the deed as a disponent, his intention was not legitimately carried into execution, and it was altogether inconsistent with the fee vested in himself.

WILSON  
v.  
GLEN.  
1819.

PLEADED FOR THE DEFENDER.—The present case resolves ARGUMENT FOR  
DEFENDER.  
into a pure question of destination, and the leading object must be to ascertain the intention of George Cunningham. In discovering intention, not only the granter's direct and explicit declarations are resorted to, but his meaning is often gathered from indications of his intention, not very direct, and appearing in subordinate parts of the deed. The intention of George Cunningham evidently was to vest the fee in his son Thomas Cunningham, to the effect that the son might be infeft, and have an immediate and direct right of property, but qualified with a reserved power and faculty to the father. If the father was the sole and exclusive fiar, there was no occasion for his reserving a faculty to do those things which were inherent in his right of fee. The clause of reservation clearly shews that the fee was disposed to the son; and although this is said to have been a mistake in point of law, there is the clearest acknowledgment that the fee was meant to be in the son, and the power and faculty reserved could not give the fee to the father.

Although the dispositive clause gives to the two spouses a conjunct fee and liferent, yet it gives an express right of fee to the son, not to take place upon their decease or failure, but *unico contextu*, and in absolute and unqualified terms. It is quite a mistake to infer that, supposing a fee vested in the father, the destination and infeftment of fee in favour of the son was inept, and that he was bound to take it up by service as an heir only by destination. It arises from confounding fees

WILSON  
v.  
GLEN.  
1819.

which are joint with subordinate fees ; the one vesting in a plurality of persons immediately and directly, and the other going to such plurality in succession.—Craig, lib. ii. dieg. 22, § 6 ; M'Kenzie, b. iii. tit. 8, § 20 ; Stair, b. ii. tit. 3, § 41, 42 ; Bankton, b. ii. tit. 3, § 116 ; Erskine, b. iii. tit. 8, § 34, 35, 36, 48. There is no reason to suppose that anything more was meant to be given to the father than a liferent ; there is no right of fee given to him, while it is given to the son. The term “ conjunct fee ” always means a liferent in one of the parties. If the son had an immediate fee co-ordinate with the supposed fee in the father, the effect would be the same as if the father had been declared a bare liferenter ; as the fee which was conjunct during the right of father and son became exclusive in the son on the death of the father.

LORD PITMILLY, Ordinary, “ Assolizied the defender.”

JUDGMENT.  
Dec. 14, 1819.

The pursuer having reclaimed, the Court “ Altered, and Found, That by the disposition in 1764, and infestment thereon, the fee of the subject was vested in George Cunningham ; and, in respect that no title was subsequently expedie in the person of Thomas Cunningham, his son, find that the settlement executed by him is inept, and therefore alter the interlocutor.”

OPINIONS.

LORD GLENLEE.—“ I rather think the interlocutor wrong. Intention is, no doubt, material in all such questions ; but it is necessary to examine distinctly what is the subject-matter of the intention. If a person has constituted in the first part of a deed only a liferent, and he declares that certain powers are still to remain with him, these powers are inherent and reserved as to a liferenter, and if he dies, these powers vanish, and nothing can pass into his *hæreditas jacens*. It is very different where there is a fee ; the reservation then declares the purpose of reserving these powers ; and all he meant by the deed is, that if he intended anything like a fee in the son, it was merely a potential fee till his death, and then to come *in actu* to be taken up by service. There is a fee given to the father, and it is a fee to which the powers are attached. These powers must be taken out of his *hæreditas jacens*. There is a necessity that

WILSON  
v.  
GLEN.  
1819.

the fee should be somewhere. If a person has only a liferent, there is no fee to which the powers are attached ; it vanishes with him. But when it is a fee in himself, he is fiar to all intents and purposes, although another person may be called fiar. Suppose that his intention had been, that he should be proprietor, but that the son should have also that right in him, to become effectual at his death, contrary to the general authority of the law, whatever force we may give to his intention, we cannot alter the established law of the land, so as to find that a fee in the father should belong to the son. There is one view of the case which struck me. If there had been no infestment, the personal right to the fee would just have been a personal right, to the same effect as when it is made feudal by the infestment ; as in the case of Livingstone, if there had been an infestment, he could not have made up a title without a special service. If there was no personal right of immediate fee before the sasine, what difference does the sasine make ? It only feudalizes the personal right ; and if the personal right was in the father, the son must have made up a title by service ; and in the same way the feudal right must be taken up. I suspect the other Division had the idea that the fee was in Thomas, and I was somewhat staggered by that. But whatever may happen in other cases, it appears to me that this question has no analogy to the case where a liferent is given, and powers reserved ; as here a fee is given, and the nature of it explained."

LORD ROBERTSON.—" I have great hesitation in adopting the opinions now delivered. It is a question of destination ; and we must look mainly to intention. I am free to admit, if the question were to be decided merely by the first words of the clause, that, according to the received interpretation, the fee would be in the father ; but in questions of destination, we must consider the other clauses. When I look at the other clauses, therefore, I view it in a different light. It appears to me that the father understood that the fee, by the conception of the deed, vested in the son ; for there is a clause, that ' although the foresaid subjects are conveyed to the said Thomas Cunningham in fee, ' &c. The father, no doubt, reserved certain powers ; but there is a distinct statement that

WILSON  
v.  
GLEN.  
1819.

the fee was in the son ; and the same is repeated in the close of the same clause, ‘ as if the fee had not been disposed to him ;’ so that you have it stated in anxious terms, that the father understood that the fee was in the son. I cannot overlook these clauses.”

LORD JUSTICE-CLERK BOYLE.—“ It appeared to me from the first that this was a question of intention. I am disposed with Lord Robertson to agree, that if the deed had stopt at the first clause, I would not have disturbed the general doctrine ; but I never could get rid of the difficulty, raised not only by the words in the reservation, but even by the dispositive clause itself, which is coupled with these words, ‘ with and under the condition after expressed.’ This is an indication of the intention, embodied in the dispositive clause. I cannot stop short at the words ‘ in fee,’ without attending to the subsequent words. In short, here is the person, in law the fiar, declared in the body of the dispositive clause to have only the power reserved in the deed ; and then there is the clause of reservation, concluding with the emphatic words, ‘ as if the fee had not been disposed to him.’ If this is a question of intention, and it is impossible to dispute that it is, (it is not like a question as to the fetters of an entail,) the only point is to discover the intention of the parties. At the time when the purchase was made, they were all present, and it was to be settled how the estate was to be conveyed. There is a declaration, that, though the father has reserved certain powers, his son was to be the fiar, and there is a direction to take the infestment in favour of the son *nominatim*.”

LORDS CRAIGIE and BANNATYNE were for altering the Lord Ordinary’s interlocutor.

The defender having now reclaimed, the Court “ Adhered.”

LORD JUSTICE-CLERK BOYLE observed,—“ I formerly entertained doubts on the effects of the additional clauses in the deed, not so much doubting the effect of the dispositive clause. But on attending to this, which is important, that independent of it being conveyed to the husband and wife, there is added, ‘ for her liferent use allenary,’ I have come to be more recon-

ciled to the interlocutor. This is just one of the circumstances to explain the meaning of the previous words, as it shews that it was meant that the wife was only to have a liferent, and that the fee was in the husband ; and attending to the series of cases, and particularly to the case of Livingstone in Bell's Reports, it is most important to adhere to the general understanding of the legal meaning of such a clause as the present ; and thinking that such is the result of these decisions, it is more advisable to adhere to the interlocutor, though it has always appeared to me to be a difficult case ; and it is only from not wishing to entertain doubts on such conveyances, that I am for adhering."

WILSON

GLEN.

1819.

Leading Cases,  
vol. ii. p. 511.

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*A conveyance to a husband and wife, and the longest liver, in conjunct fee and liferent, and to the heirs of the marriage in fee, imports a right of fee in the husband.*

## MADDEN v. CURRIE'S TRUSTEES.

A FEU-DISPOSITION was granted " in favour of Edward Kerr and Elizabeth Morrison or Kerr, and to the longest liver of them two, in conjunct fee and liferent, and to the heirs of the marriage of the said Edward Kerr and Elizabeth Morrison ; whom failing, to his and her own nearest and lawful heirs or assignees whomsoever, equally between them, in fee, heritably and irredeemably." Infestment followed in favour of the spouses, " and to the longest liver of them two, in conjunct fee and liferent, and to the aforesaid in fee."

Feb. 22, 1842.

NARRATIVE.

The husband predeceased the wife without issue. The wife thereafter sold the subjects to the defenders, but they declined to accept of a conveyance from her, on the ground, that under the terms of the feu-disposition she had not, by her survivance, acquired the whole fee of the subjects. The pursuer then brought an action, in which she called the trustees of her husband, and his heirs, for their interest, as well as the purchaser, in which she sought to have it found, that by the feu-disposition

MADDEN  
v.  
CURRIE'S  
TRUSTEES.  
1842.

referred to, she had a good and valid title to the whole of the subjects in question, and in which she further concluded to have the purchaser decerned to implement the missives of sale.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—The subjects contained in the feu-disposition were not acquired with money from either the husband or the wife. The destination to the two spouses is not in liferent merely, but in conjunct fee and liferent, and to the longest liver of them two, not to the longest liver in fee, but to both in conjunct fee and liferent. The institution and substitution in the deed is complete. There being a complete estate created and disposed in favour of the spouses and longest liver, there is no occasion to look at all to the heirs called to explain the destination, as the deed explains itself, and the terms make a perfect disposition in favour of the survivor. Had the destination been to A and B, and other heirs of A in fee, it would have been important to see whose heirs were called, for the purpose of explaining the terms of the deed. Where there is within the deed a well-created fee in the spouses and the survivor, the fee is in that one of the spouses who survives. The question is, Where that fee is now? and that appears from the deed, the words disposing of the fee to the longest liver preceding the substitution in favour of heirs.

ARGUMENT FOR  
DEFENDERS.

PLEADED FOR THE DEFENDERS.—The title offered by the pursuer is not a valid one, in respect that, by her survivance, she acquired the fee of at least not more than one half of the subjects. She could not therefore in her own person make an effectual conveyance of the whole subjects in her own person. If the argument of the pursuer be right, that the mere survivance vests the wife with the full fee under the terms of the destination, this would give her a right in preference to the eldest son of the husband. The husband is always the *persona predilecta*, and the presumption is, that the liferent only, not the fee, is in the wife. It is quite fixed, that a right of conjunct fee and liferent to the husband and his heirs gives him the fee. It may be admitted that a destination to husband and wife, in conjunct fee and liferent, and to the survivor and their heirs and assignees in fee, gives the fee to the surviving



wife. There was a doubt as to the meaning of the word *their* in such a destination, but the opinion prevailed that it meant the survivor's heirs. The dispute about this word shews that the decision of it one way or other would settle the question as to the rights of the survivor. The terms, in the case of Neilson, were quite the same as in this case; and that authority must either be cut down, or rule this case; but it has been supported by subsequent decisions. The case of Ferguson turned upon the question, whether it was a destination to the heirs of the marriage or to the heirs of the survivor, depending on the meaning of the word *their*. It was there held, that *their* heirs meant the heirs of the survivor. The argument on the other side goes the length of saying, that if the destination was to the heirs of the husband, the fee would still be in the surviving wife.

MADDEN  
v.  
CURRIE'S  
TRUSTEES.  
1842.

LORD CUNINGHAME, Ordinary, Found "That the pursuer is not in a situation to give a valid title to the whole property to the defenders; and that by the conception of the said feu-right, she was only vested in a contingent liferent of the same, and that her husband was *fiar* thereof during the subsistence of the marriage: Finds that, upon the dissolution of the marriage, the pursuer was entitled to claim one-half of the fee of the said property, as now belonging to her and her heirs, under the ultimate destination in the settlement, without prejudice to her right of liferent over the other half: And in respect this appears to be agreeable to the view of her right admitted in the defences, on the whole matter sustains the defences, and assoilzies the defenders from this action; reserving to the pursuer to bring such action of implement or otherwise, as she may be advised, of the contract of sale libelled on, upon her tendering a good and sufficient title to the defenders, and to the latter parties their defences thereagainst, as accords."

The pursuer having reclaimed, the Court, of new, Found JUDGMENT.  
Feb. 22, 1842. "That the pursuer cannot of herself give a good title to the subjects in question, and remitted to the Lord Ordinary."

LORD JUSTICE-CLERK HOPE observed,—“This is an action OPINIONS.

MADDEN  
v.  
CURRIE'S  
TRUSTEES.  
1842.

at the instance of Mrs. Madden, the widow of a person of the name of Edward Kerr, against the representatives of Archibald Currie, to whom Mrs. Madden had sold some heritable property, to which she alleges that she had an absolute right under a feu-contract obtained by her husband. The action demands implement of the missives of sale, and payment of the price, on receiving a disposition to the subjects. But the summons contains a prior conclusion as necessary to entitle the pursuer to judgment against these defenders, viz., that the pursuer has, by virtue of her husband's deed, a good right to the whole of the subjects. That conclusion is directed against the husband's heirs-at-law. No appearance is made for them, and no decree has been taken against them. A decree in absence would not have been sufficient to exclude the purchasers from trying the point, and they have accordingly disputed the pursuer's right to give them a title ; but still the pursuer has not even such a decree against the heirs-at-law.

“ The deed under which the pursuer maintains that she has right to, and is entitled to sell the subjects in question, is a feu-disposition obtained by the late Edward Kerr, the pursuer's former husband, from Sir M. Shaw Stewart, in 1833, by which the subjects were feued ‘ to and in favour of Edward Kerr and Elizabeth Morrison or Kerr, and to the longest liver of them two, in conjunct fee and liferent, and to the heirs of the marriage of the said Edward Kerr and Elizabeth Morrison ; whom failing, to his and her own nearest and lawful heirs and assignees whatsoever, equally betwixt them, in fee, heritably and irredeemably.’ The defenders plead that Mrs. Madden, under this deed, has not right to the whole of the subjects—certainly not right to more than to the fee of one-half.

“ With what precise meaning the term ‘ in conjunct fee and liferent,’ or, ‘ to two parties, and the longest liver of them two in conjunct fee and liferent,’ were introduced into our practice, it would not be easy to determine, and is not now very profitable to inquire. The term was not perhaps a very accurate legal description in any sense. The sense in which it was used varied with many other exponents of the object of parties in the different classes of deeds in which it was employed. But there is one form in which it is used, as to which I apprehend

the legal meaning of it was clearly fixed at a very early period, viz., a right taken by the husband, as in this case, to two spouses, and the longest liver in conjunct fee and liferent, and to the heirs of the marriage. I have always understood it in that case to be clear law, that the fee was vested in the husband, just as much as if the wife had not been conjoined with him, and that she is in that case conjoined with him solely for a right of liferent. The pursuer's argument, that you must not look to the substitution which follows the mention of the spouses, or, as I term it, to the provision to the heirs of the marriage in such a case, is against all principle and every decision. Indeed, in the simple case of such a destination followed by their heirs, one of the strongest grounds on which the fee is given to the wife as the longest liver, is, that their heirs means the heirs of the longest liver, and that as the longest liver may be either spouse, the wife surviving equally with the husband may get the fee, contrary to general principle. The Solicitor-General, not adopting this argument, rather wished to make out that the heirs of the marriage was the same thing as *their* heirs, and if in the one case the fee went to the wife, being longest liver, so ought it in the other. The answers to that observation are obvious, and need not be stated.

“ The case of *Neilson v. Murray* appears to me to be a clear and direct authority. I cannot find that there is any difficulty in that case in arriving at the point decided. The appellant's case is short and distinct, and brings out the point most clearly. The question on the import of the deed arose simply and directly as a point for decision, and it was in terms decided by the express words of the judgment, which found that the husband was *fiar*. I cannot find the difficulty pressed upon us as to drawing out the point from the facts of that case. On the contrary, the facts presented the point in a very remarkable manner. The appellants had purchased the estate from the mother, Elizabeth Maxwell, as having right by another title, but with consent of the son of the marriage, William M'Artney, a Papist. But the Court found—1. That the husband was *fiar*. 2. That the right descended to his daughter by a former marriage, to the exclusion of the children of his marriage with Elizabeth Maxwell, being Papists, the dispoonee of that daugh-

MADDEN  
v.  
CURRIE'S  
TRUSTEES.  
1842.

MADDEN  
v.  
CURRIE'S  
TRUSTEES.  
1842.

ter (who happened to be the Protestant son of the mother by her first marriage, which seemed to give some intricacy to the case) proving that the heirs of the lease were Catholics. 3. That the purchaser was in the knowledge of the marriage-contract, and could not acquire right, in concert with the mother, in defraud of the same. There were many other points in the cause, many of them arising out of and consequential on these findings; but these come out most clearly on the face even of the appellant's case, and are embodied in the interlocutors. These interlocutors are affirmed. The case is taken as a ruling authority by Bell, in his 'Principles and Illustrations.' The other cases referred to of Ferguson and Riddell, are in no degree inconsistent with Neilson *v.* Murray. On the contrary, I think they all assume the point in the latter case to be fixed, and draw a most marked distinction between the two forms of destination or provision, 'their heirs,' or the 'heirs of the marriage' following the formula in question. There are other and older cases to the same effect. Some are noticed in Bell's Illustrations, II., 505, which were not quoted—in particular, the case of Laws, which I consider an important authority. The plea of the pursuer is, that by the deed in question, a right taken by the husband to heritable property, she by survivance acquired a right of fee to the exclusion of the heir of the marriage. I apprehend that plea to be against principle. I am of opinion that the wife had only a right of liferent. The heirs of the marriage having failed, the husband having died without allocation, what shall be the effect as to the fee of one-half in consequence of the concluding words of provision, 'to his and her own nearest heirs and assignees equally between them in fee,' it is unnecessary in my view of the case, in the present state of matters, to inquire. If the pursuer has not a right of fee in the whole property, she cannot fulfil her part of the contract of sale, or give a title, and that is sufficient for judgment in favour of the defenders at present. But I am not for adhering to the interlocutor as it stands. I think the whole of the first part is too minute and special for the grounds of judgment. I am inclined simply to take the finding at first, that the pursuer cannot give a valid title to the defenders, to the property sold by her to the

late Archibald Currie. The remainder of the interlocutor I do not think should be in it at all. After the finding I have mentioned, I would simply assaillzie, with the reservation, adding ‘within due and proper time.’”

MADDEN  
v.  
CURRIE'S  
TRUSTEES.  
1842.

LORD MEDWYN.—“We were asked to read the clause of disposition in this feu-right, as if it consisted of three separate and independent clauses.—1. To and in favour of the husband and wife, and the longest liver of them two, in conjunct fee and liferent. 2. And to the heirs of the marriage of the said husband and wife. 3. Whom failing, to his and her own nearest and lawful heirs and assignees whomsoever, equally between them in fee. Now I had always understood, that so to read a clause of destination, when the object is to ascertain who is *fiar* in conjunct fees, and to look only to the words immediately instituting the first disponees in the deed, was opposed to the best established rules of construction in such cases. Stair most distinctly lays down this:—‘The next difficulty is, who is *fiar* in possessions or tailzies of sums, annual-rents, or lands in conjunct fee, wherein these rules do ordinarily take place. 1. That the last termination of heirs whatsoever inferreth that person of the conjunct *fiars*, whose heirs they are, to be *fiars*, and the other liferenters. 2. When that is not expressed *potior est conditio masculi*, the heirs of the man are understood.’ We cannot, therefore, exclude the consideration of the ulterior destinations, in order to ascertain the rights of the conjunct *fiars*; in fact, it is from these that this is to be gathered; and there are cases where the Court have had to construe even a larger destination than in the present case—have considered every successive clause in it, and taking a combined view of the whole, have, with the light reflected back, determined the character of the two parties, the first disponees. Stair mentions one, ‘where a charter provided lands to a husband and his wife, the longest liver of them two, and the heirs betwixt them; which failing, to the heirs of the man’s body; which failing, to the wife her heirs whatsoever.’

“Now, then, what in law is the import of a destination of a feu-right to a man and his wife, and to the longest liver of them, in conjunct fee and liferent, and to the heirs of the marriage? If the wife survives, and there be no issue of the marriage, is she *fiar*?

MADDEN  
 v.  
 CURRIE'S  
 TRUSTEES.  
 -----  
 1842.

I think the law has been quite consistent, and has always found, in consequence of the destination to the heirs of the marriage, which are the heirs of the husband, that he is *fiar*, and the wife, though the survivor, is only *liferenter*. When it was thought that a destination to a husband and wife, the longest liver, and their heirs, meant their joint-heirs, and of course had the same meaning as heirs of the marriage, the husband was held to be *fiar*, although the wife survived ; and, accordingly, when a different meaning came to be attached to the term 'their heirs,' and it came to be understood as the heirs of the survivor, and thus was distinguished from the heirs of the marriage, the survivor was constituted *fiar*, because the destination carried the subject to his or her heirs. But as a destination to the heirs of the marriage always means the heirs of the husband, the husband has always been held *fiar*, and the wife only a *liferenter*, although she should be the survivor. The earliest case in which a claim on the part of the surviving wife was made, seems to have been that of *Edgar*, June 1727, but the element of *survivance* does not occur there. This, however, did occur in the case of *Wilson*, 1732, which was decided ultimately in the House of Lords, and it was held that the fee was not in the surviving wife. *Watson*, in 1766, was a case similar to *Edgar*. The case of *M'Donald*, in 1831, was of a different kind ; it was, whether, where the destination was to the spouses in *liferent*, and the heirs of the marriage in fee, the fee was not in the children ? In truth, I do not think the addition of the phrase, 'to the survivor of the two,' of much importance, if the heirs of the marriage be the next destination. The question of *liferent* or fee is regulated by this, and not by the previous words. If *conjunct fee* applies to the right of the husband, and *liferent* to the right of the wife, the right of the one or the other will remain with the survivor, relieved from the right of the other ; the husband surviving, will continue to have the fee of the whole—the wife surviving, will take the *liferent* of the whole, although the words, 'to the survivor of the two,' be not expressed. It can only be of consequence to insert them when the further destination is to 'their heirs and assignees.'

" The parties did not argue what effect the ulterior destina-

tion, 'to his and her nearest heirs equally in fee,' might have, and therefore I say nothing upon that point. It is enough for the decision of the present case that the surviving wife's right does not carry the fee of this subject."

MADDEN  
v.  
CURRIE'S  
TRUSTEES.  

---

1842.

LORD MONCREIFF.—"I had at first some doubts in this case ; but I am now satisfied that the interlocutor is right in the result of the first point found by it, viz., that the pursuer had not by her survivance of her husband an entire right of fee in the property. I have no doubt of the rule as laid down by Erskine and Bell, that in a disposition to husband and wife in conjunct fee and liferent, and the longest liver and their heirs, the wife by her survivance has a right of fee. The doctrine in Erskine settles this ; and the cases of Ferguson and Riddell, and other cases, fully confirm it. Indeed the case of Forrester v. M'Gregor, ultimately decided in the House of Lords, is a still stronger authority ; for, while all the law, as laid down by Erskine, was there expressly adopted, the title in that case was to the husband and wife 'in conjunct liferent,' and not 'in conjunct fee and liferent,' and to the longest liver and their heirs and assignees in fee. Yet Lord Brougham, in a very luminous judgment, held that there was a fee in the surviving wife. But the important difference here is, that the destination, after the provision to the husband in conjunct fee and liferent and the survivor, is not to their heirs, but to the heirs of the marriage. It certainly is not laid down by Erskine, that this alters the rule which he has otherwise stated, on the effect of a provision 'to the longest liver and their heirs ;' but he there refers to the case of Ferguson as his authority, contrary, as he supposes, to the old case of Justice. What Mr. Bell says at the end of his second head, does not come up to the point ; and neither does the case of Watson, to which he refers, because they do not apply to the case of a provision to the 'longest liver.' But in Mr. Bell's fourth and fifth heads, he gives the general rule in that case for a fee in the surviving wife, but without adverting to the special case of the destination being to the heirs of the marriage, or the heirs of their bodies.

"These considerations raised doubts in my mind at first reading the Lord Ordinary's note and the record ; and to be

MADDEN  
v.  
CURRIE'S  
TRUSTEES.  
1842.

sure, when Mr. Erskine treats the case of Ferguson as opposed to that of Justice, one might infer that he did not hold the provision to 'the heirs gotten between them,' which occurred in the case of Justice, to take it out of the rule of Ferguson. But in this he seems not to have written with his usual discrimination. There is evidently a difference in principle, for when the fee, failing both spouses, is provided to the heirs of the marriage, there is an evident presumption against the husband's intention to give a fee to the wife on her survivance, to the exclusion of heirs of his own body, which does not apply to the case of a general destination to 'their heirs,' which may mean, and has been held to mean, the heirs of the survivor. The case of Justice, therefore, ought perhaps rather to be considered as an authority for the precise distinction, which is here material. I am satisfied, however, that the point was distinctly determined by the Court and the House of Lords in *Neilson v. Murray*. There is no confusion in this point. There is some obscurity in the report of the case, from the new ground taken after the first judgment, and from the discussion to which that gave rise; but the point here in question was distinctly decided, viz., that under the terms of the marriage-contract the fee was in the husband. I think that the principle of that case is strongly confirmed by the grounds of judgment in the case of Ferguson, as reported by Kilkerran. If 'their heirs' could have been made 'the heirs of their bodies,' the judgment would clearly have been different; it turned on the distinction. *Riddell, &c.*, just followed Ferguson; and it further appears to me, that in the case of *Forrester v. M'Gregor*, Lord Brougham expressly states the very case, and takes the distinction, which was probably the reason for what he says of the old case of Justice. On the whole, I have now a clear opinion on the point."

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*A conveyance to a husband and wife in conjunct liferent, during all the days of their lifetime, and to the survivor, and their heirs and assignees in fee, imports a right of fee in the survivor.*

M'GREGOR v. FORRESTER.

IN 1787, James Forrester, by an ante-nuptial contract of marriage, conveyed certain heritable subjects “to himself and Mary M'Gregor, his promised spouse, in conjunct liferent, during all the days of their lifetime, and to the longest liver of them and their heirs or assignees in fee.” He farther bound himself “to infest and seize himself, and the said Mary M'Gregor, his promised spouse, in conjunct liferent, during all the days of their lifetime, and the longest liver of them, and their heirs or assignees in fee, in due and competent form, by two several infestments and manners of holding.” The procuratory of resignation and precept of sasine contained in the marriage-contract were conceived in the same terms.

April 18, 1884.

NARRATIVE.

On the husband's death the widow brought an action of declarator against her eldest son, to have it found and declared that she had the only good and undoubted right to the fee of the lands conveyed in the marriage-contract.

PLEADED FOR THE PURSUER.—By the terms of the conveyance contained in the pursuer's marriage-contract, the fee of the lands conveyed by it is vested in the pursuer as the survivor of the marriage. There is a conveyance, first, of a conjunct liferent to the spouses, and, secondly, of the fee to the longest liver of the two, and their heirs and assignees. The liferent is contained in the first member of the dispositive clause, and then follows the disposal of the fee, which is, “to the longest liver of the spouses, and their heirs or assignees, in fee.” There is no rule of construction by which such a conveyance can be held to import anything less than a conveyance in fee to the survivor of the marriage.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE DEFENDER.—The subjects in question belonged to the husband, and he got nothing by the pursuer

ARGUMENT FOR  
DEFENDER.

M'GREGOR  
".  
FORRESTER.  
1834.

in return. The legal effect of the marriage-contract is to give the pursuer a liferent only, and not a fee. There is first a conjunct liferent. The words are, "to himself and the said Mary M'Gregor, in conjunct liferent, during all the days of their lifetime." There is then a right of survivorship. The words are, "to the longest liver of them." Lastly, there is a right of fee. The words are, "and their heirs in fee." It is a conjunct liferent, during the lifetime of the spouses, then a liferent during the lifetime of the survivor, and then a fee in the heirs of the spouses. There is nothing in the construction of the words to raise a fee in the surviving wife, or to apply the intermediate right of survivorship to the fee which follows, more necessarily than to the liferent which precedes. If the words do not clearly and unambiguously give the pursuer a right of fee, no such right can be claimed by her. The contract ought not to be construed so as to leave the children destitute. The wife's heirs are not preferred, for the children of the marriage are equally the heirs of both. There is nothing, therefore, to justify the interpretation, that the fee was intended to be conveyed to the wife.

JUDGMENT.  
June 3, 1831.

The Court "Decerned in terms of the libel."

House of Lords.  
April 18, 1835.

The defender having appealed to the House of Lords, "It was Ordered and Adjudged that the interlocutor complained of be Affirmed."

OPINIONS.

LORD BROUGHAM.—"My Lords, this case turns entirely upon the construction of a clause in a marriage settlement, or rather contract, in the following words :—'In contemplation of which marriage, and in consideration of the sums after mentioned, contracted on the part of the said Mary M'Gregor, the said James Forrester hereby disposes and conveys, to and in favour of himself and the said Mary M'Gregor, his promised spouse, in conjunct liferent, during all the days of their lifetime, and to the longest liver of them, and their heirs or assignees in fee, heritably and irredeemably, all and hail the just and equal half of the said James Forrester's nine-shilling and nine-penny-land of old extent, in the Garth quarter, commonly called

Bullshill, with the houses, biggings, &c., which some time belonged to James Riddock, who disposed the same to Janet Hutton, deceased, the said James Forrester's late spouse, and from whom he acquired right by his contract of marriage, as to the one-half; and by a disposition from her, bearing date the 29th day of December 1780, as to the other half, and upon which titles he stands infeft.' As to the question upon the fact of description, I have no doubt that Bullshill is treated as *tenementum separatum*, so that the only question is, whether this provision gave the fee to the survivor, whether husband or wife, or only to the husband, with a liferent to the wife?

McGREGOR  
v.  
FORRESTER.  
1884.

"The Court below held that the wife took a fee by having survived, and I am of opinion their Lordships came to a right conclusion. As in other countries, so in Scotland, considerable nicety has been introduced into the construction of instruments which deal with the fee of estates, while they also deal with a life interest in the same, or as we should say in England, which at once give a particular estate carved out of the whole fee, and dispose of the remainder, or that which remains of the fee, upon the determination of the particular estate. The Scotch law regards the interests successively taken, as successive fees peculiarly restricted, and not as one estate or interest carved into portions. But one remark is applicable to both systems of jurisprudence, because it arises from the natural course of things in men's dealing with their property, without having very well defined ideas of their own intentions. The constructions given to certain words are really often much less arbitrary and refined than they appear to be. The Court is forced to find a meaning where the party has expressed it most obscurely; still oftener where he entertained inconsistent and repugnant intentions, and where we are obliged to choose between the two; or where he only entertained an imperfect or partial intention, and we must supply the defect, so as to further what was his most probable, and therefore presumable intentions. The rules of construction thus adopted from necessity, are to be regarded as fixed, in order that men's affairs may be governed by known principles, and that the law may be uniform. Of this, the doctrine of the Scotch law, touching settlements or gifts to husband and wife, afford a remarkable illustration. If

M'GREGOR  
 v.  
 FORRESTER.  
 1884.

an interest is given to husband and wife, in conjunct fee and liferent, and to the heirs of the marriage, and to the heirs of their bodies, the latter expression clearly shews, that as far as this marriage goes, the husband's heirs take, and the wife's heirs being his, the fee is in fact his. At least, there being a necessity to choose which shall have a fee, which both cannot have, and the law not allowing a fee to remain in suspense or abeyance, the husband is preferred, and the fee is vested in him. No violence is done to the words ; and the plain intent is followed out as far as it can be, without being inconsistent with any other meaning expressed, and with known and fixed rules of law. But when it is to the parties in conjunct fee, and their heirs, their ' marriage ' being dropped, the heirs of the one are not those of the other party ; and as some one must have the fee, the law does not hold this a joint estate, but prefers the husband *propter personæ dignitatem*. The wife's right, notwithstanding the words ' conjunct fee,' is reduced to a liferent ; and ' their heirs,' as well as ' heirs of their body,' is read as if it had been the husband's heirs only—under certain restrictions in special circumstances, not necessary to be here gone into.

" Something of the same kind is observable in our doctrine of limitations and estates. Where something self-repugnant is to be found in a gift, where the giver, whether testator or settler, discloses not one plain or consistent intention, but two meanings which cannot both stand, we must choose between them the best way we can. Mathematicians call this an impossible case where there is something self-repugnant or contradictory in the different conditions of a problem, and of course they cannot resolve it. But the courts of law are often obliged, in the affairs of mankind, to come as near the prevailing or general intent as they can, and to this they sacrifice the particular intent. Thus an estate to a man for life, and no longer, with remainder to the heirs of his body, is self-contradictory, for there is by one part of the gift an estate for life, and in another, an estate tail given to him. And so an estate to a man for life, with remainder to his heirs and assignees, is a fee, because one part being a life estate, and another a fee, we cannot give him both, and must choose by the prevailing and therefore probable intent.

“ The settlement before us is materially different from the ordinary case, of which alone we have hitherto spoken. It is not to the party in conjunct fee, but in liferent only, and to the longest liver, and their heirs and assignees in fee ; and the question is, whether or not the rule in the husband’s favour applies here ? It is quite plain that we are not driven here, as we might be thought in the former case to be, by the necessity of choosing between two irreconcilable intentions. The whole may in the present instance stand well together. The husband and wife have no conjunct fee given them, and then something to their heirs, but they have a liferent only, and a fee is given to their heirs and assignees. But in case this should be thought to import a fee to themselves also, as if it had been to them in conjunct fee, and their heirs, which I am not disposed to dispute, the important words are added, ‘ and to the longer liver, and their heirs.’ Now I think this may, consistently with rest of the gift, well be read, ‘ to the parties jointly for life, and then to the survivor, and that survivor’s heirs,’ which is plainly a liferent to both jointly, and a fee to the longer liver. The authority of Erskine is quite explicit in favour of this view of the gift. He says, ‘ when the right is between the husband and wife, and to the longest liver, and other heirs, the fee is, in the event of the wife’s surviving, adjudged by our late decisions, to belong solely to the wife, to the entire exclusion of the husband’s heir, as if the right had been granted in the same terms to two strangers, contrary to the old practice, III. 8, 36 ;’ and he cites, as shewing the old practice, the case of Justice in 1668, reported by Lord Stair ; and as shewing the altered and modern course of decision, he cites that of Ferguson, 1739. There can be no doubt that this last decision fully bears out Mr. Erskine’s statement. It was the case of a bond to the husband and wife, and the longer liver of them two, their heirs, executors, and assignees ; and Lord Kilkerran, who reports the decision, states it to have gone on the force assigned to the words, ‘ the longer liver and their heirs,’ which was, he said, read as if it had been to the heir of the longer liver. Now, can we avoid this inference, without wholly rejecting these words, ‘ longer liver ?’—a violence far too great to be done to such a material expression. But I do not think that the older

M'GREGOR  
v.  
FORRESTER.  
1835.

M'GREGOR  
v.  
FORRESTER.  
1835.

case of Justice, cited by Mr. Erskine, so satisfactorily proves the older law to have been wholly different on this point. It was a bond to husband and wife, and the legal heir of them two, and heirs gotten betwixt them, or their assignees; which failing, to the heirs of the last heir, and it was held to be a fee in the husband, and that the heirs of the marriage were heirs of provision to him, and that failing heirs of the marriage, the wife's heirs were substituted as heirs of tailzie, and they ordered such a disposal of the money as gave the reversion to the wife's heirs and assignees after the decease of the only heir of the marriage. Dirleton, who also observes upon the case, says, that the Lords held the wife had not the fee, but that her heirs took as heirs of provision to the heir of the marriage. The denial of the wife taking any fee, is hardly reconcilable with the decision which vested the reversion, expectant upon the only child's life interest, in the assignees, as well as heirs of the wife; for what is the interest in a chattel given to assignees as well as heirs other than a fee-simple? However, we need not embarrass ourselves with this case, where we find that of Ferguson so much more clear the other way. Indeed, independent of nice construction on the cases, the plain and unhesitating dictum of Mr. Erskine is of the greatest weight. It stands unimpeached by subsequent decision,—is in strict accordance with the principle which I have stated, and is contradicted by no principle of law. It therefore must be taken to be sufficient for settling this point. I have carefully examined the other cases upon these questions, both the older ones and those of more recent date, and I find nothing inconsistent with the opinion which I have formed. I can find no doubt expressed as to the doctrine of Erskine, and the soundness of the case of Ferguson, except the observation of part of the Court in the later case of Murray, 1827. That case was not, however, decided on this ground, and Lord Gillies expressly says, that but for the specialty in it, the law would have been clear upon the authority of Erskine and of Ferguson's case. I would therefore beg leave to move your Lordships that the decision be affirmed."

1. In the case of *FERGUSON v. M'GEORGE*, July 22, 1739, a bond, which bore the sum to have been received from husband and wife, was taken to the man and his wife, and the longest liver of them two, their heirs, executors, and assignees. The marriage being dissolved by the predecease of the husband without children, and an action having been brought in order to have it determined to whom the sum in the bond belonged, the Court found it to belong absolutely to the wife, as longest liver. LORD KILKERRAN, in his Decisions, observes,—“Several of the Lords dissented, who were of opinion that it resolved into a liferent only to the wife, agreeable to the express opinion of Craig, L. 2, Dieg. 22, and that the construction put upon that opinion of Craig's, that it referred only to proper feus and not to money, was without foundation, his reasoning in that passage applying to the one as well as to the other. There was no doubt but the husband was so far fiar, as not only to have the disposal of the money during his life, but that it was also affectable by his creditors. But the question turned upon this, Whether by the words, ‘their heirs,’ were only understood the heirs of the marriage, who alone could be properly called their heirs, and that the farther substitution of the husband had, *per errorem*, been neglected, as Craig *dicto loco*; or if the natural force of the words, their heirs, in this case, was the same as if the bond had borne, and to the heirs

of the longest liver? which last prevailed as above.”—*Kilkerran's Decisions*, p. 189.

2. In the case of *BOROUGHES v. M'FARQUHAR'S TRUSTEES*, July 6, 1842, Mr. M'Farquhar purchased a property, and took the titles to himself “and his spouse, in conjunct fee and liferent, and to the survivor, and their heirs, assignees, or disponees whomsoever.” After her husband's death, his widow brought an action against her husband's trustees, concluding to have it found that she, in virtue of the above conveyance, had now an unlimited fee in the subjects conveyed. The defenders PLEADED,—That according to the sound construction of the conveyance founded on, the pursuer's right to the subjects conveyed was not that of an absolute or unlimited fee, but a liferent right only. LORD CUNINGHAME, Ordinary, “Found that according to the legal construction of the dispositive clause in the disposition libelled on, the pursuer, as the survivor of the spouses, is now the unlimited fiar of the property thereby conveyed.”

3. In a Note to his Interlocutor his Lordship observed,—“The present case is distinguished from the late case of *Madden and Currie*, by that difference in the destination which is held to import a transmission of the entire fee to the surviving wife, which was not maintainable in *Madden's case*. In that instance, the disposition was taken to the spouses ‘in conjunct fee, and to the heirs of the marriage of the said Edward Kerr and Elizabeth Madden; whom

failing, to his and her own nearest and lawful heirs, heritably and irredeemably.' Here the disposition is in favour of the spouses 'in conjunct fee and liferent, and to the survivor and their heirs (not of the marriage), assignees, or disponees whomsoever, heritably and irredeemably.' When the destination is in the preceding terms, without any substitution of the heirs of a subsisting marriage, the Lord Ordinary holds himself bound by a series of authorities which he cannot now question, to construe the right as vesting a fee in the survivor.—See Erskine, B. iii. t. 8, § 36, and Mr. Bell's Commentaries, vol. i. p. 56, and the authorities therein referred to. The defenders allege that the cases quoted related to the construction of bonds, and not to conveyances of land, but the Lord Ordinary is not aware that any distinction can be taken between the cases. It is quite clear that our institutional writers view the legal interpretation given to this destination in the reported cases, as regulating it in all rights in which it is adopted by the parties. Further, the legal interpretation due to this destination was fully considered, and the fee found to belong to the surviving wife, in a case where the words were less favourable to support a claim of fee than those which are used in the present case. The case referred to is that of *M'Gregor v. Forrester*, which was raised on a disposition granted by a husband 'to himself and his promised spouse in conjunct liferent, during

all the days of their lifetime, and to the longest liver of them, and their heirs and assignees, in fee.' In that case the fee was adjudged to the surviving wife, both in this Court and in the House of Lords. The question was considered in this Court as clear and settled; but Lord Brougham entered fully into its merits in the House of Lords, and adverted to all the authorities. But as the previous conveyance there was in conjunct liferent only, while the disposition here is both in liferent and fee, it follows *a fortiori*, that the destination in the present instance ought to carry the fee to the wife. It was remarked that the question in *Forrester's* case occurred on a provision in an antenuptial contract of marriage, while the claim here is founded on a conveyance by the husband to the wife long after marriage. But if a party conveys any property or right under a substitution of definite technical import in law and practice, it must receive effect, whatever may be the form or occasion of the deed in which it is inserted."

4. The defenders having reclaimed, the Court "Adhered." LORD JUSTICE-CLERK HOPE observed,—“We can hardly disturb the universal practice and understanding of the law on this subject. I think there is a clear and valid principle for the decisions on this point. There is here a conveyance to the two persons in conjunct fee and liferent, and to the survivor, and their heirs and assignees. There being a clear and distinct conveyance of



the fee to the survivor, to take effect on the decease of the other, and this condition being purified by the event occurring, how can the law refuse effect to such conveyance? Can the law hold, in respect of the conveyance to heirs whatsoever, that there is a limitation of the fee to the husband? It appears to me that, by the force of the dispositive words, the

fee is conveyed to the survivor." LORD MEDWYN concurred. LORD MONCREIFF.—"I am of the same opinion. We cannot know the party's intention by anything else than by legal construction of the deed. He evidently had great favour for his wife, perhaps indiscreet favour. I cannot separate this from the case of Forrester in the House of Lords."

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*A conveyance by a husband or wife to both the spouses, and the longest liver in liferent, and to the children of the marriage in fee, does not import a right of fee in the survivor of the spouses, but leaves the fee untransferred.*

MACKELLAR v. MARQUIS.

IN 1823 James Scott and his wife, "in order to settle their affairs, and prevent all disputes and differences regarding the succession to their means and estate," executed a postnuptial disposition and settlement, by which they conveyed all the property, heritable or moveable, which might belong to them at their death, "in favour of themselves and the longest liver of them in liferent, and to the children that might be procreated of the marriage equally amongst them in fee;" whom failing, to the husband's sister, Marion Scott, spouse of John Marquis, in liferent, for her liferent use allenarly, and to her heirs, disponees, or assignees, in fee. The general conveyance was granted, with the exception of the household furniture and of the sum of £500, which were declared to be at the disposal of the wife at her death.

Dec. 4, 1840.

NARRATIVE.

Power was reserved to the spouses, during their joint lives, to alter the settlement in whole or in part, as they might think proper; and power was also reserved to the husband, in case of his being the survivor, to sell and dispose of their whole means and estate, or to make void the settlement at pleasure.

MACKELLAR  
v.  
MARQUIS.  
1840.

James Scott died in 1839 without issue, leaving considerable property, both heritable and moveable. None of the property had come through the wife. In 1840 Mrs. Scott raised an action against John Marquis, her husband's nephew, who along with the other children of Marion Scott, had obtained themselves decerned and confirmed executors-dative of their uncle James Scott, *qua* general disponees. In this action she alleged that she was fiar of the whole estate under the deed of 1823, and concluding against the executors for a count and reckoning, and for payment to her of the whole moveable estate, and of the rents drawn from the heritable estate, and for delivery of the title-deeds of the heritable estate. The defenders resisted, on the ground that she had no right of fee, except in the household furniture and in the sum of £500, which had been expressly placed at her disposal.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—A destination to parents “in liferent,” and to children *nascituri* in fee, vested the fee, not in the children, but in the parents, one or other of them, according to circumstances. In the present case, these dispositive words were so applied as to vest the fee in the survivor of the spouses, because they were conceived “in favour of ourselves,” viz., the parents, “and the longest liver of us,” and “to the children that may be procreated of our marriage.” For these children, if existing, were necessarily the heirs of the surviving spouse. And thus, while using such dispositive terms as imported the conveyance of a fee to the spouses, the conveyance of that fee was farther conceived in favour of the survivor of the spouses, and of those who were, at least in the first instance, looked to as the heirs of such survivor. But there were numerous decisions to the effect that the conveyance of a fee to spouses, and the survivor of them, and the heirs of the survivor, imported a fee in the survivor, whether husband or wife.

The technical construction given by the law to a destination in favour of parents in liferent, and children *nascituri* in fee, was not, in the general case, capable of being controlled by any reference to the mere intention of the parties, whether gathered from the other terms of the deed, or intrinsically from the destination itself. But even if it were, there was nothing

in the subsequent clauses which established the intention of the parties that the right of the surviving wife should be restricted to a liferent.

MACKENZIE  
v.  
MARQUESS  
1840.

The destination over in favour of a third party, failing the parents and the children of the marriage, could not affect the previous constitution of the fee in the parents or survivor of the parents. But Marion Scott and her children were truly gratuitous third parties in reference to a postnuptial settlement, under which no onerous rights arose excepting to the contracting parties and their contemplated issue.

The clause reserving power to the spouses jointly to alter the deed, during their lives, shewed that the husband had not a fee left in him, and was wholly incompatible with the existence of a full right of fee in him, as he could, in that case, have altered the deed at pleasure by his own act. And he had no large power of alteration, excepting in an event which never happened, viz., his surviving.

PLEADED FOR THE DEFENDERS.—*Ex figura verborum*, a right of liferent merely was given to the pursuer; in which respect the case differed from those of Ferguson and Macgregor, &c. And though it was an established rule, that a conveyance by a third party to a parent *nominatim* in liferent, and to children *nascituri* in fee, created a fee in the parent, this rule had no application to a conveyance between spouses, where there was not the same presumption that the spouse-disponer meant to divest himself, or to make the rights of the children subordinate to those of the other spouse. Nor did any difficulty arise in this case as to the fee being *in pendente*, because the pursuer was not the sole disponent; her husband, in law the *dignior persona*, was a disponent also; and thus there was no necessity for a constructive fee in her person.

ARGUMENT FOR  
DEFENDERS.

Even assuming that there was no onerosity in the origin of the right conferred by the deed on the defenders, it was enough for them if the husband died vested in the fee, as they were called as his heirs, and the pursuer's action, so far as rested on the allegation that she was *fiar*, must be groundless. Failing children of the marriage, no relation of the pursuer's was called in any event. A sister of the husband and her children were

MACKELLAR  
v.  
MARQUE.  
1840.

expressly called, and as the husband was entitled to select among his relations the person whom he most favoured, this was just as strong an instance of the well-known test, *cujus hæredibus maxime prospicitur*, as if the husband's heirs in general had been called. The provision as to the reserved power to alter also shewed that the husband was chiefly considered in the deed, as no such power was reserved to the pursuer if she survived, while the fullest power was reserved to the husband.

Even if the construction of the dispositive clause were doubtful, several of the subsequent clauses, and especially the clauses giving a right of fee in the furniture and in a sum of £500, shewed a clear intention to limit the pursuer's right to a life rent; and that intention ought to receive effect. There was scarcely any case of a settlement affecting the interests of spouses and children, where the whole deed was not to be looked to, and the intention of parties gathered from its general result; and certainly the present deed ought to be so dealt with.

LORD CUNINGHAME, Ordinary, Found, "That according to the sound legal construction of the said settlement by the pursuer and her husband, the pursuer, Mrs. Scott, was only constituted a life rentress of the subjects therein specified in case of her survivance, with the exception of the household furniture, and of a legacy of £500 sterling, placed at the pursuer's disposal at her death: Therefore finds that the pursuer, Mrs. Scott, has no title to insist in the conclusions for payment of the moveable funds, nor for a conveyance of the heritable estate, and delivery of the titles thereof, as libelled."

Note of Lord  
Ordinary.

In a Note the Lord Ordinary observed,—“It humbly appears to the Lord Ordinary, that the authorities for the construction of the deed contended for by the defender are altogether insuperable. In the first place, there never was at any period, nor is there now, any doubt, that a conveyance in general and ordinary terms, to a specified party (by name) in life rent, and to another party (also named) in fee, confers only a limited right of life rent on the first party, while the fee descends to the second. In cases of that description, there is no need of the

qualifying term 'allenary' to limit the liferenter's right, because he is both *ex figura verborum*, and, in every legal point of view, a mere liferenter, as the conveyance imports. In the next place, however, it appears from a history of the law and its precedents, that in process of time, from various causes, a species of liferent came to be recognised, which was only a limited right in name, while the liferenter truly enjoyed all the rights of fee. Such was the case when parties made resignation or took charters from the superior for new infeftment in their own favour in liferent, and to their heirs-male or heirs-of-line in fee, reserving power to alter, burden, or sell the premises. Such a title was expedite to give their heirs facility in getting infeftment when the succession opened to them, and it is well known that many of the *mortis causa* settlements of heritage were made in these terms. Hence rights of liferent in a large class of cases were construed and truly constituted rights of fee. In like manner, nominal rights of liferent were considered as rights of fee, in other instances, where a supposed technical necessity existed for that construction, as when dispositions or settlements were given to individuals in liferent, and their children *nascituri* in fee. According to the view of old feudalists, no fee could continue *in pendente*; and as it was often difficult to find any party in whom the fee could even by fiction be held as vested, when a right was conveyed to unmarried parties in liferent, and their lawful children in fee, it came to be presumed in such cases that the rights of ownership were meant to be given to the disponee, though denominated a liferenter only. But even that rule of law was evidently felt to be highly unjust and inexpedient, and therefore when a term was used—supposed to denote with peculiar clearness that the disponee was to be restricted to a liferent (as by the use of the word 'allenary')—a conveyance in such terms was restricted in law to a liferent. Upon that principle, a mutual settlement by a husband and wife of their whole estate on themselves, in conjunct liferent, and their children in fee, is construed as a right which still leaves the husband an unlimited fiar, at least to the effect of enabling him to burden or alienate the estate onerously to any extent. That point is incontestable; but—

MACKELLAR  
F.  
MARQUIS.  
1840.

MACKELLAR  
v.  
MARQUIS.  
1840.

“ The question which arises here, as to the extent of a wife’s right under a settlement in the preceding terms, on her survivancy, is not within the preceding rule. The pursuer, indeed, argues very plausibly, that when a settlement is executed by spouses in favour of themselves and of the survivor in conjunct liferent, (without the qualifying adjunct of ‘ allenary,’) and of the heirs of the marriage in fee, whom failing, of the husband’s heirs—that, as the husband in that case continues *fiar*, so the wife being conjoined with the husband in the destination, must, on her survivancy, have an equally extensive right, and as his right was not confined to a liferent allenary, that she also has an unlimited fee in the subjects.

“ But it is almost conclusive to observe, that the right of a wife under such a destination (which certainly is of very common occurrence) has never been so construed, nor is there any necessity on technical rules that it should be so. For holding the husband as *fiar* during his life, the fee will not be *in pende* on his death ; though the wife is limited to a liferent, it will pass either to the heir of the marriage, if there be one, or to the husband’s heir-of-line, if the spouses have left no children. The wife seems to be viewed as one of the heirs of the husband, bound to take the estate under the limitations which he imposes. Accordingly, the limitation of her right under such a destination as the present, is laid down by all our authorities, both early and late. The decisions are pretty fully adverted to in the cases ; but the doctrine, as laid down by Lord Stair, deserves particular notice. In treating of conjunct fees, (which is rather a more extended destination than that given in the conveyance libelled on,) his Lordship says (B. ii. t. 3, § 41,) ‘ that these, by the custom of England, are always so understood that the survivors have the whole benefit so long as any of them are alive : but we do only extend this survivancy to conjunct infeftments to husband and wife, which bears ordinarily to the longest liver ; but though that were not expressed, it would be understood as implied, and generally it resolves in the wife, but as a liferent, and the husband is understood to be *fiar*, unless it be evident that the right was originally the wife’s, and a liferent only designed for the husband.’ The learned author adds in a subsequent section, (B. ii. t. 6, § 10,) in treat-

ing of liferent infestments to husband and wife, 'so strong is this presumption, that no more is meant to be granted to wives but their liferent right, and no part of the fee, that it still takes place unless the provision bear expressly 'a power to the wife to dispoñe.'

MACKELLAR  
v.  
MARQUE.  
1840.

"This doctrine is abundantly borne out by the authorities. It is sufficient to refer to the old case of the Laird of Dairsey in 1663, (Dict., p. 4257,) where a bond was granted to two parties, spouses in liferent and their children in fee ;—it was found that on the death of the husband the wife could not uplift and discharge that bond of herself, but that it was necessary to have the children served heirs of provision and infest, upon which they fell either to renounce or concur in the discharge. Again, the claim of a surviving wife as a fiar under a similar destination, seems to have been regularly tried in the case of Neilson v. Murray in 1732, (Craigie and Stewart's Rep., p. 65,) and disallowed both by this Court and in the House of Lords ; while in the subsequent case of Finlayson in 1760, (Dict., p. 12,874,) and the late case of Bell v. M'Lauchlan in the First Division, (9 Shaw, p. 269,) it was taken for granted in argument as a point perfectly indisputable, that the wife had no claim beyond a liferent. The decision in the last case is peculiarly entitled to weight, as the report shews that it was repeatedly and very anxiously considered by the Court.

"While such has been the construction put on settlements of this description in general, it is apprehended that the structure of the settlement here, and circumstances under which the succession is claimed, very strongly confirm the plea of the fiar ; for when the husband died, there being no children of the marriage, the fee opened to the defender, Mrs. Marion Scott. Now, whatever there may be in the rights of a wife when a succession opens to her in liferent, and the children of her body *nascituri*, yet when the fiar nominated is a stranger, called by name, and when no children of the liferentrix's body ever can succeed, there is no legal ground on which the wife can in such a case claim the fee. It is apprehended that Mrs. Marion Scott here was a conditional institute in the fee, and that the settlement is to be read in the same way as if the conveyance had been in favour of the spouses in liferent, and to 'Marion

MACKELLAR  
v.  
MARQUIS.  
1840.

Scott in fee.' That of course would have superseded all doubt as to the extent of the liferentrix's right.

" Still farther, the deed contains *in gremio* sundry other provisions, which shew very clearly that the defender was limited to a liferent only. These are so clearly enumerated in the defender's revised case, (pp. 20-25,) that it is sufficient generally to refer to them. They humbly appear to the Lord Ordinary to be decisive. In particular, how is it possible to resist the inference, deducible from the provision, that the wife should have the disposal of £500 at her death, with the interpretation that she was meant to be the fiar, and thus to have a power over the whole property, heritable and moveable, conveyed? It is said that the legacy of £500 was provided in case she predeceased her husband; but the settlement contains an express provision limiting Mrs. Scott's right to the £500, and to the household furniture, in the case of her survivance. Again, the provision that the whole of Mrs. Scott's liferent should cease, in case of her entering into a second marriage, is another most conclusive demonstration to shew, that the parties understood that the right conveyed to her under this settlement was meant and understood to be a right of liferent only. The deed of settlement should be printed along with the cases when this question is brought under the review of the Court.

" The whole argument on these clauses is met by the reply, that in questions of this description, a technical destination, when its legal construction is clearly fixed, cannot be affected by any evidence, however strong, that the parties truly intended it to have another effect. But that must generally be a question of circumstances depending on the clauses from which the evidence of intention is derived; and it seems a solecism to argue, that there can be any case in which technical terms cannot be controlled and explained (especially in testamentary deeds) by a clear expression of the real meaning of parties. It is unnecessary, however, to enlarge on that doctrine, as it appears clearly that destinations in the terms used in the deed now under consideration, have always received an interpretation similar to that which an examination of the clauses of this deed in detail so strongly supports."



The pursuer having reclaimed, the Court “Adhered.”

MACKELLAR  
v.  
MARQUIS.

1840.

JUDGMENT.  
Dec. 4, 1840.

OPINIONS.

LORD GILLIES.—“The case is by no means free from difficulty ; but I am for adhering to the interlocutor, on the grounds stated in the note of the Lord Ordinary.”

LORD MACKENZIE.—“I also think the interlocutor right, and concur in the reasons stated in the note of the Lord Ordinary. The reason why the husband is held to have a fee where the liferent is given to the spouses and their children *nascituri*, is, that by the principle of our law a fee cannot be *in pendente*. That principle may force the fee into the husband, but it cannot force the fee into the wife. I see no technical principle, therefore, to force the fee into the wife ; and if you get rid of the technical principle, and look to the whole circumstances and the fair construction of the deed, the right of the surviving wife seems to be only a liferent. I cannot think that the husband could have intended to give everything to his wife, so as that she should have the disposal of the estate, possibly to the exclusion of his own heirs. The husband had not only a technical fee, but a power was reserved to him, if he should be the survivor, to revoke the deed and settle the estate as he chose. No such power was given to the wife ; and the contrast is of importance.”

LORD FULLERTON.—“I am of the same opinion. The argument of the pursuer rests on two propositions,—*First*, That wherever there is a conveyance to the parent or parents in liferent, and the children *nascituri* in fee, the fee must be held to be in the parent or parents ; and, *second*, That a conveyance to the married parties and the survivor in conjunct fee and liferent, and the children of the marriage, truly constitutes a fee in the survivor. Now, I dissent from both of these propositions, and think neither of them supported by the decisions to which reference has been made. It is true that if there be a conveyance from a third party to one of the spouses in liferent, and his or her children *nascituri* in fee, the fee is held to vest in the person to whom, on the face of the deed, nothing is given but the liferent. There was at one time great difficulty in determining in whom, in such a case, the fee truly vested. From the supposed necessity of satisfying the theory that a fee

MACKEILLAR  
v.  
MARQUIS.  
1840.

cannot be *in pendente*, it was assumed that it could not be in the children yet unborn. In some of the cases, it was argued that in such circumstances the fee remained with the disponer. But that view was excluded by the obvious consideration, that as between the disponer and the disponent there could be no doubt that the deed was intended to take, and must take, instant effect, so as at all events to divest the disponer; and the conclusion was come to, that the fee must be held to be in the parent or parents, though nominally liferenters. And it now must be held to be a fixed rule in conveyancing, that without the addition of the word 'allenary,' or some equivalent expression of intention, the term liferent must be so construed. It is quite another case, however, when the conveyance flows, not from a third party, but from one of the married parties themselves. There is no room for the presumption that the deed was intended to take instant effect, but rather the reverse; and, accordingly, the fee is held, in such circumstances, not to be in the other spouse to whom the liferent is given, but to be retained in the person of the granter. Thus, in Anna Brown's case, (M. 4529,) the destination by the wife was to her husband in liferent and the heirs of the marriage; whom failing, to the husband, his heirs and assignees in fee, reserving her own liferent. It was decided there that the husband was a naked liferenter. The other cases referred to by the defender, and the reasoning by which they appear to have been supported, are, if possible, more conclusive. However fixed, then, the rule may be in construing the term 'liferent' in dispositions from third parties as extending to the fee, there is no authority, but the reverse, for applying that rule to the case of dispositions between the married persons themselves. There, on principle, as well as on the authority of practice, I think the term must receive its natural and appropriate signification, leaving the fee in the person from whom the right flows. But this is sufficient to decide the present case. There is here merely a conveyance by the two married parties themselves of the liferent, and there is nothing to convert constructively the liferent, which alone is given to the wife, into a fee. If they had each had separate estates, and each had executed a separate deed in similar terms, the fee of each estate would still have remained

in the person of each of the granters ; and the circumstance of its being a joint-conveyance, can make no difference. But it is not said that the wife had any separate estate, the fee of which could remain in her as the granter."

MACKENZIE  
v.  
MARQUESS  
1840.

LORD ADVOCATE.—" There is her share of the goods in communion."

LORD FULLERTON.—" She can have no claim for that in fee ; that was no estate in her person ; and whatever was the nature of that right, it was expressly abandoned by her in this very deed."

" But I also demur to the other proposition of the pursuer, viz., that where there is a conjunct fee and liferent given to the married parties and the survivor, and the children of the marriage, the fee must always be held to be in the survivor. The proposition is founded on a misapprehension of the decisions, and of the passage in Erskine, (3, 8, 36,) ' where the right is taken to the husband and wife, and to the longest liver and their heirs, the fee is, in the event of the wife's survivorship, adjudged by our later decisions to belong solely to the wife, to the entire exclusion of the husband's heirs, as if the right had been granted in the same terms to two strangers, contrary to the older practice.' The later decision here referred to is confessedly that of Ferguson, (M. 4202 ;) and what was that case ? ' A bond bore the sum of 1000 merks to be received from the husband and wife, obliging the debtor to repay the same to the husband and wife, and longest liver of them two, their heirs, executors, or assignees.' The pursuer here maintains, that that case was identical with the present, and reads ' heirs, executors, or assignees,' as equivalent to ' heirs of the marriage,' which is said to be substantially the same thing, because the children of the marriage were equally the heirs of both parties. But it was not so regarded. So far from that being correct, the very distinction between the two destinations was there taken, as appears from Kilkerran's report. ' But the question turned upon this, whether by the words " their heirs " were only understood the heirs of the marriage, who alone could be properly called " their heirs," and that the farther substitution of the husband had *per errorem* been neglected, as Craig *dicto loco* ; or if the natural force of the words, " their heirs," in this case, was the same as if the bond had borne, " and to the heirs of

MA'KELLAR  
v.  
MARQUIS.  
1840.

the longest liver?" which last prevailed.' It is evident from this report that the question was, whether 'their heirs, executors, and assignees,' could be so construed as meaning the 'heirs of the marriage,' and that, if it had been so considered, the fee would have been held to be in the husband. So that the case, so far from supporting the pursuer's view, operates the other way, and confirms by implication the decision in Neilson, a case all the stronger, because the property flowed from the wife, and yet the fee was held to be in the husband, the destination being to the spouses 'in conjunct fee and liferent, and the survivor of them, and the heirs of the marriage.' Accordingly, in all the cases quoted by the pursuer, in which the fee was held to be in the surviving wife, the destination was not to the heirs of the marriage, but to the parties and the survivor, and 'their heirs, executors, or assignees,' or some other expression admitting of being construed as implying the heirs of the survivor. There is not one case of the kind in which the destination was to the heirs of the marriage. For the case of *Wilson v. Forrest* (M. 4208) was one in which there could be no doubt, and which rested on a different ground. There the money had come from the husband. The husband had survived; and the only question was, whether the husband had the power to uplift and discharge the bond without the consent of the children. It is clear that there the fee must have been held to have been in the husband, but it afforded no support to the proposition, that the fee would have vested in the wife if she had been the survivor. As to the case of *M'Gregor's trustee*, it does not touch the point. There the words of the deed were to the married persons 'in conjunct liferent during all the days of their lifetime, and to the longest liver of them, and their heirs or assignees in fee;' and it is clear, from the report of the case, that the ground of the decision of the House of Lords was, that the terms of the deed were such as to bring it within the rule of the case of *Ferguson v. M'George*, and the other similar cases. The result seems to be, that, in general, the disposition to the husband and wife in conjunct fee and liferent will be construed as vesting the fee in the husband as the *dignior persona*, more particularly when the property flows from the husband; but that this construction

may be excluded, and the fee held to vest in the survivor, by expressions warranting a different presumption, and that such a different presumption will arise when the disposition is to the husband and wife, and the survivor and their heirs and assignees, because that is to be construed as meaning the heirs and assignees of the survivor, but that it does not arise when the disposition is, as here, to the husband and wife and survivor, and the heirs of the marriage.

MACKELLAR  
F.  
MARQUIS.  
1840.

“ Even supposing, then, that the pursuer could make out, that in this deed the word *liferent* was to be read as equivalent to conjunct fee and *liferent*, I do not think her claim could be sustained.

“ There is, however, one other remark I have to make, which is not noticed in the argument, but which, if well founded, would go to exclude entirely that constructive extension of the term *liferent* on which the pursuer’s argument is founded. The cases in which that construction was sustained were, all of them, proper cases of marriage-contract, or at least of instant conveyance ; and that was the very circumstance from which alone the supposed incompetency of the suspension of the fee could arise. But the present seems to me to be a deed of a totally different kind. It is nothing but a *mortis causa* settlement. It sets out with the declared intention of ‘ settling our affairs, and preventing disputes and differences regarding the succession to our means and estate ;’ and it conveys all lands and means and estate, ‘ presently belonging, or which may be belonging to us at the time of our death,’ to the survivor in *liferent* and the children of the marriage ; whom failing, to various other persons in fee. There is not the slightest ground or authority for construing, in such a deed as this, the term *liferent* in any other sense than its obvious and natural meaning. By the deed itself the husband, if the survivor, had the power to sell or dispose of the whole subjects conveyed, or to make void ‘ those presents at pleasure ;’ a power which, independently of any legal presumption, truly rendered him the unlimited *fiar* in the event of his survivancy ; while the wife’s right was, by the leading clause, limited to a *liferent* ; and there is nothing in the deed giving her, in the case of survivancy, any higher or more unqualified right.

MACKELLAR  
v.  
MARQUIS,  
1840.

“ On the whole, then, I have no doubt that the interlocutor of the Lord Ordinary ought to be adhered to.”

LORD PRESIDENT HOPE concurred. “ His Lordship thought it manifest that the intention of the parties was to restrict the wife’s right to a liferent.”

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*A conveyance by a husband or wife to both the spouses, in conjunct fee and liferent, for their liferent use allenary, and to the heirs of the marriage in fee, whom failing, to the heirs whatsoever of either or both of the spouses, leaves the fee untransferred in the event of there being no heirs of the marriage, and gives a spes successionis merely to the heirs whatsoever of the spouses.*

WILSON v. REID.

Dec. 4, 1827.  
NARRATIVE.

MARGARET REID, after her marriage to Allan Wilson, conveyed an heritable subject to her husband and herself, and to the longest liver, in conjunct fee and liferent, for their liferent use allenary, and to the heirs to be procreated between them, whom failing, to the heirs of the wife to the extent of one-half *pro indiviso*, and to the heirs of the husband to the extent of the other half, *pro indiviso*, in fee. On this deed infestment followed.

After being married upwards of twenty-seven years without having any family, and having arrived at an age when there was little prospect of having any, she brought an action of declarator against her own and her husband’s heirs whatsoever, for the purpose of having it declared that the absolute fee of the property was vested in her, and that she was entitled to sell and dispose of it at pleasure.

ARGUMENT FOR  
PURSUER.

PLEADED FOR THE PURSUER.—The pursuer was originally the fiar of the subjects in question. She must therefore be held to remain fiar, unless it shall clearly appear that she had divested herself and conveyed the fee to the defenders. All, however, that was conveyed to the defenders was a mere *spes successionis*. The heirs whatsoever of the spouses were merely the substitutes of the heirs to be procreated of the marriage, and

could never acquire any substantial right in the subjects. The utmost which they were entitled to claim was a *spes successionis* in the event of no issue of the marriage existing. The pursuer, therefore, had never been divested of the fee of the subjects.

WILSON  
r.  
REID.  
1827.

PLEADED FOR THE DEFENDER.—By the conveyance executed by the pursuer, she disposed to herself and her husband a right of liferent merely. The taxative term allenarly restricted her original right of fee to that of liferent. By the terms of the conveyance, therefore, a fiduciary fee was created, by which the defenders, failing issue of the marriage, acquired a vested right, of which it was not in the pursuer's power to deprive them. The point was so decided in the case of Newlands.

ARGUMENT FOR  
DEFENDER.

LORD NEWTON, Ordinary, Found,—“ That on the principle of the decision in the case of Newlands, and the later cases founded on by the defenders, the right of the pursuer was, by her disposition of 14th May 1807, reduced to a liferent ; at least, that if the fee remained in her person, or that of her husband, it was a fiduciary fee for behoof of the children of the marriage, and failing them, of the pursuer's heirs *quoad* the one-half, and of her husband's heirs *quoad* the other ; finds, therefore, no ground for the declaratory conclusion of the libel, that the absolute fee of the property is in the pursuer, and that she is entitled to sell and dispose thereof at pleasure, and assoilzies the defenders from said conclusion.”

The pursuer having reclaimed, the Court called on the counsel for the defenders to support the interlocutor, and without hearing the counsel for the pursuer, unanimously “ Altered,” and decerned in favour of the pursuer.

JUDGMENT.  
Dec. 4, 1827.

LORD BALGRAY.—“ This is certainly a question of importance ; but with all the respect I have for the opinion of the Lord Ordinary, I differ from him entirely. The arrangement which took place in this case is very common among parties who marry without a contract, and are desirous to make a provision for themselves and for the issue of the marriage. We must therefore exercise great circumspection in regard to such

OPINIONS.

WILSON  
v.  
REID.  
1827.

a deed, and in ascertaining what are the precise rights of the parties. The disposition in question is of a mixed nature, being on the one hand onerous and *inter vivos*, and on the other *mortis causâ*. The pursuer was, at the date of the marriage, the absolute and unlimited fiar of the subjects. Now, how was that fee taken out of her? The rule of law is, *traditionibus et usucapionibus, non nudis finibus, dominia rerum transferuntur*. She could not therefore divest herself of the fee by a mere renunciation, or otherwise than by an actual conveyance to, and vesting of it in another party. So far as regarded the heirs of the marriage, this was an onerous deed, and bestowed upon them a *jus crediti*; but, so far as regards the heirs whatsoever, it is merely a *mortis causâ* deed, not vesting in them any right whatever, but merely giving them a *spes successionis*, which could never vest the fee in them. It follows, therefore, that the fee remains in the person of the pursuer."

LORD CRAIGIE.—"I am of the same opinion. The decision in the case of Newlands, when examined, does not apply to the present question. That decision did not determine the general point, as appears from a note of the Lord Chancellor in the Faculty Collection, which shews that it was regarded as a special case. In that case the disponent was a bastard, and the grant flowed from a third party; whereas here the fee belonged to the pursuer, and I doubt extremely if she ever intended to divest herself of it, at least during her life. I conceive that the fee was never taken out of her, I apprehend she would have been entitled to dispose of it, even without the necessity of a reduction."

LORD GILLIES.—"I am entirely of the same opinion. The deed gives merely a *spes successionis* to the heirs whatsoever."

LORD PRESIDENT HOPE.—"It is quite impossible that the interlocutor can stand."



## INDEX OF CASES.

	PAGE		PAGE
Advocate, Her Majesty's, v.		Bontine v. Duke of Montrose,	405
Cuming, . . . .	712	Borroughs v. M'Farquhar's Trus-	
Advocate, Her Majesty's, v.		tees, . . . .	739
Graham, . . . .	352	Boswell v. Inglis, . . . .	450
Agnew v. Stewart, . . . .	221, 242	Boyd v. Macharg, . . . .	192
Ainslie v. Douglas, . . . .	630	Boyes' Trustees v. Earl of Dun-	
Ainslie v. Watson, . . . .	336	donald, . . . .	324
Alexander v. Gerran, . . . .	659	Brown v. Cairns, . . . .	117
Allan v. Cameron's Creditors, . . . .	10	Brown v. Miller, . . . .	29
Allan v. Kennedy, . . . .	629	Brown v. Wallace, . . . .	303
Allardice v. Allardice, . . . .	655	Broughton's Creditors v Gordon, . . . .	6
Anderson v. Dempster and Dud-		Bruce v. Bruce Carstairs, . . . .	518
geon, . . . .	115	Bruce v. Spence, . . . .	432
Anderson v. Nasmyth, . . . .	337	Buccleuch (Duke of) v. Cunyng-	
Anderson v. Young and Trotter, . . . .	66	hame, . . . .	338
Andrews v. Laurie, . . . .	679	Buchan v. Cockburn, . . . .	315
Argyle (Earl of) v. M'Naughton, . . . .	372	Buchan v. Farquharson, . . . .	137
Athole (Duke of) v. Robertson, . . . .	432	Buchanan v. Snodgrass, . . . .	531
Auchendachy's Creditors v.			
Grant, . . . .	185, 481	C	
Ayton v. Monnypenny, . . . .	484	Cairns v. Brown, . . . .	117
		Caitcheon v. Ramsay, . . . .	432, 434
B		Caithness (Countess of) v. Earl	
Baillie v. Clark, . . . .	713	of Rosebery, . . . .	184
Baillie v. Denham, . . . .	186	Calder v. Stewart, . . . .	248
Baird's Trustees v. Mitchell, . . . .	293	Campbell v. Campbell, . . . .	253
Baker v. Gedde, . . . .	432	Campbell v. Campbell, . . . .	595
Balfour v. Lumsden, . . . .	530	Campbell v. Campbell, . . . .	704
Barr v. Cuthbertson, . . . .	27	Campbell v. Lord Elibank, . . . .	534
Beaumont v. Lord Glenlyon, . . . .	456	Campbell v. Harley and Dun, . . . .	291
Bell v. Gartshore, . . . .	119	Campbell v. Henderson, . . . .	306
Blair v. Rosco's Creditors, . . . .	65	Campbell v. McNeill, . . . .	655
Blair v. Shedden, . . . .	470	Campbell v. Wilson, . . . .	501
Bogle and Smith v. Gray, . . . .	531	Cameron's Creditors v. Allan, . . . .	10
Bontine v. Graham, . . . .	568	Carleton's Creditors v. Gordon, . . . .	190

	PAGE		PAGE
Carstairs Bruce v. Bruce, . . .	518	Douglas v. Stewart, . . .	174, 185
Chambers v. Law, . . .	470	Douglas, Heron, and Co., v. Thomson, . . .	132
Chisholm v. M'Donald, . . .	195	Drummond v. Ross, . . .	209
Clark v. Baillie, . . .	713	Drysdale v. Paton, . . .	336
Cochrane's Representatives v. Neilson, . . .	583	Dudgeon and Dempster v. Anderson, . . .	115
Cockburn v. Buchan, . . .	315	Duff v. Gordon, . . .	4
Coutts v. Tailors of Aberdeen, . . .	269	Dun and Harley v. Campbell, . . .	291
Crawford v. Durham, . . .	438	Duncan v. Wylie, . . .	134
Crawford v. M'Michen, . . .	324	Dundas v. Dundas, . . .	671
Crawfurd v. Workman, . . .	115	Dundas (Lord) v. Moncreiff, . . .	109
Cubbison v. Hyslop, . . .	328	Dundonald (Earl of) v. Boyes' Trustees, . . .	324
Culter v. M'Lellan, . . .	432	Dundonald's Creditors v. Preston, . . .	289
Cuming v. Earl of Fife's Trustees, . . .	445	Durham v. Crawford, . . .	438
Cuming v. Her Majesty's Advocate, . . .	712	Durham v. Durham, . . .	531
Cunningham v. Cunningham's Creditors, . . .	51		
Cunningham and Dickson v. Dickson, . . .	232	E	
Cunningham and Medwyn v. Dickson, . . .	234	Elibank (Lord) v. Campbell, . . .	534
Cunningham and Wallace v. Kennedy, . . .	116	Elliot v. Elliot, . . .	63
Cunynghame v. Duke of Buchleuch, . . .	338	Elliot v. Maxwell, . . .	468
Currie's Trustees v. Madden, . . .	723	Emslie v. Fraser, . . .	679
Cuthbertson v. Barr, . . .	27	Erskine v. Nielson, . . .	439
D		F	
Dalrymple v. Fullarton, . . .	484	Falconer v. Wright, . . .	662
Dempster and Dudgeon v. Anderson, . . .	115	Farquharson v. Buchan, . . .	137
Denham v. Baillie, . . .	186	Ferguson v. M'George, . . .	739
Dewar v. M'Kinnon, . . .	607	Fergusson v. Gracie, . . .	370
Dickson v. Dickson and Cunningham, . . .	232	Fergusson v. M'Cubbin, . . .	110
Dickson v. Dickson, . . .	715	Fergusson v. Mitchell, . . .	120
Dickson v. Syme, . . .	194	Ferrier v. Wauchope, . . .	259
Dott v. Lindsay, . . .	606, 630	Fife's Trustees v. Cuming, . . .	445
Donald v. Harvey, . . .	660	Fife's (Earl of) Trustees v. Sinclair, . . .	378
Douglas v. Ainslie, . . .	630	Forbes v. Livingstone, . . .	342, 409
Douglas v. Graham, . . .	446	Forrester v. M'Gregor, . . .	733
Douglas v. Adjudging Creditors of Kelhead, . . .	169	Fraser v. Emslie, . . .	679
		Fraser v. Wilson, . . .	23
		Frog's Creditors v. His Children, . . .	602
		Fullarton v. Dalrymple, . . .	484
		Fullerton v. Hamilton, . . .	599

G			
	PAGE		PAGE
Galloway v. Liston, . . .	463	Hoome v. Stewart, . . .	13
Gartshore v. Bell, . . .	119	Hope Vere v. Hope, . . .	365
Gedd v. Baker, . . .	432	Houlditch v. Spalding, . . .	667
Geddes v. Miller, . . .	469	Hunter v. Saunders, . . .	463
Gerran v. Alexander, . . .	659	Hutton's Trustees v. Hutton, . . .	701
Gibb v. Livingstone, . . .	132	Hyslop v. Cubbison, . . .	328
Glen v. Wilson, . . .	716	I	
Glenlyon v. Beaumont, . . .	456	Inglis v. Boswell, . . .	450
Gordon v. Broughton's Creditors, . . .	6	Ireland v. Neilson, . . .	128
Gordon v. Carleton's Creditors, . . .	190	K	
Gordon v. Duff, . . .	4	Keith v. Grant, . . .	308
Gordon v. Gordon, . . .	474	Kelhead's Adjudging Creditors	
Gordon (Duke of) v. Macdonnell, . . .	320, 416	v. Douglas, . . .	169
Gordon v. M'Intosh, . . .	617	Kelly v. Paterson, . . .	304
Gracie v. Fergusson, . . .	370	Kennedy v. Allan, . . .	629
Graham v. Bontine, . . .	568	Kennedy v. Cunningham and	
Graham v. Douglas, . . .	448	Wallace, . . .	116
Graham v. Graham's Creditors, . . .	194	King v. Ross, . . .	687
Graham v. Her Majesty's Advocate, . . .	352	Kinross v. Shaw, . . .	114, 254
Graham v. Duke of Hamilton, . . .	404	L	
Graham's Creditors v. Rome, . . .	38	Lamont v. Lamont's Creditors, . . .	35
Grange's Creditors v. Livingston, . . .	114	Law v. Chambers, . . .	470
Grant v. Creditors of Auchendachy, . . .	185, 481	Lawson v. Thomson, . . .	658
Grant v. Keith, . . .	308	Laurie v. Andrews, . . .	679
Grant v. Shepherd, . . .	336	Liddle v. Lilly, . . .	606
Gray v. Smith and Bogle, . . .	531	Lilly v. Liddle, . . .	606
Grieve v. Walker, . . .	577	Lindsay v. Dott, . . .	606
H		Liston v. Galloway, . . .	463
Hamilton v. Fullerton, . . .	599	Livingstone v. Forbes, . . .	342, 409
Hamilton (Duke of) v. Graham, . . .	404	Livingstone v. Gibb, . . .	132
Harley and Dun v. Campbell, . . .	291	Livingston v. Creditors of	
Harvey v. Donald, . . .	660	Grange, . . .	114
Harvey v. Wilson, . . .	576	Lockhart v. Macdonald, . . .	367
Henderson v. Campbell, . . .	306	Logan v. Maxwell, . . .	677
Henderson v. Henderson's Creditors, . . .	59	Lovat v. Mackenzie, . . .	1
Heron v. Stewart, . . .	243	Lumsden v. Balfour, . . .	530
Heron, Douglas, and Co. v. Thomson, . . .	132	M	
Home (Earl of) v. The Earl of Marchmont, . . .	433	Macdonald v. Lockhart, . . .	367
		Macdonell v. Duke of Gordon, . . .	320, 416
		Macharg v. Boyd, . . .	192
		M'Intyre v. Masterton, . . .	21

	PAGE
<b>Mackellar v. Marquis,</b>	741
<b>Mackenzie v. Lovat,</b>	1
<b>Madden v. Currie's Trustees,</b>	723
<b>Marchmont (Earl of) v. The Earl of Home,</b>	433
<b>Marquis v. Mackellar,</b>	741
<b>Martin v. Paterson,</b>	16
<b>Masterton v. M'Intyre,</b>	21
<b>Maule v. Maule,</b>	506
<b>Maxwell v. Elliot,</b>	468
<b>Maxwell v. Logan,</b>	677
<b>Maxwell v. Maxwell,</b>	522
<b>Medwyn and Cunningham v. Dickson,</b>	242
<b>Mein v. Taylor,</b>	696
<b>Millar v. Small,</b>	90
<b>Miller v. Geddes,</b>	469
<b>Miller v. Brown,</b>	29
<b>Mitchell v. Baird's Trustees,</b>	293
<b>Mitchell v. Fergusson,</b>	120
<b>Moncreiff v. Lord Dundas,</b>	109
<b>Monnypenny v. Ayton,</b>	484
<b>Montrose (Duke of) v. Bontine,</b>	405
<b>Moray (Countess of) v. Wemyss,</b>	441
<b>Morrison v. Yuille,</b>	579
<b>Munro v. Munro,</b>	373, 469
<b>M'Cubbin v. Fergusson,</b>	110, 119
<b>M'Donald v. Chisholm,</b>	195
<b>M'Donald v. M'Lachlan,</b>	630
<b>M'Dougall v. M'Dougall,</b>	483, 510
<b>M'Farquhar's Trustees v. Borroughs,</b>	739
<b>M'George v. Ferguson,</b>	739
<b>M'Gregor v. Forrester,</b>	733
<b>M'Intosh v. Gordon,</b>	617
<b>M'Intosh v. M'Intosh,</b>	708
<b>M'Kinnon v. Dewar,</b>	607
<b>M'Lachlan v. M'Donald,</b>	630
<b>M'Lellan v. Culter,</b>	432
<b>M'Lellan's Creditors,</b>	5
<b>M'Michen v. Crawford,</b>	324
<b>M'Nab's Trustees v. Place,</b>	19
<b>M'Naughton v. Earl of Argyle,</b>	372
<b>M'Neill v. Campbell,</b>	655

## N

	PAGE
<b>Napier v. Scott,</b>	700
<b>Napier v. Spier's Trustees,</b>	109
<b>Nasmyth v. Anderson,</b>	337
<b>Neilson v. Cochrane's Representatives,</b>	533
<b>Nielson v. Erskine,</b>	439
<b>Neilson v. Ireland,</b>	128
<b>Newlands v. Newlands' Creditors,</b>	634

## O

<b>Ogilvie v. Ogilvie,</b>	43
----------------------------	----

## P

<b>Paterson v. Kelly,</b>	304
<b>Paterson v. Martin,</b>	16
<b>Paterson v. Purves,</b>	364
<b>Paton v. Drysdale,</b>	336
<b>Paul v. Reid,</b>	324
<b>Peddie's Heirs v. Soot's Trustees,</b>	69
<b>Pierse v. Ross,</b>	177
<b>Place v. M'Nab's Trustees,</b>	19
<b>Pollock v. Waddell,</b>	577
<b>Pollock v. Wilson,</b>	571
<b>Presbytery of Perth v. Magistrates of Perth,</b>	316
<b>Preston v. The Earl of Donald's Creditors,</b>	289
<b>Purves v. Paterson,</b>	364

## R

<b>Ramsay v. Caitechon,</b>	432, 434
<b>Reid v. Paul,</b>	324
<b>Reid v. Wilson,</b>	754
<b>Renton v. Watherston,</b>	659
<b>Robertson v. The Duke of Athole,</b>	432
<b>Rome v. Graham's Creditors,</b>	33
<b>Rosco's Creditors v. Blair,</b>	65
<b>Rosebery (Earl of) v. Countess of Caithness,</b>	184
<b>Ross v. Drummond,</b>	209
<b>Ross v. King,</b>	687
<b>Ross v. Pierse,</b>	177

	PAGE		PAGE
Ross's Creditors <i>v.</i> Russell,	252	Taylor <i>v.</i> Smith,	185
Russell <i>v.</i> Creditors of Ross,	252	Thomson <i>v.</i> Douglas, Heron, and Company,	132
S		Thomson <i>v.</i> Lawson,	658
Saunders <i>v.</i> Hunter,	463	Thomson <i>v.</i> Thomson,	659
Scott <i>v.</i> Bruce Stewart,	334, 464	Trotter and Young <i>v.</i> Anderson,	66
Scott <i>v.</i> Napier,	700	W	
Seton <i>v.</i> Seton's Creditors,	685	Waddell <i>v.</i> Pollock,	577
Shaw <i>v.</i> Kinross,	114, 254	Walker <i>v.</i> Grieve,	577
Shedden <i>v.</i> Blair,	470	Walker's Trustees <i>v.</i> Stewart's Trustees,	139
Shepherd <i>v.</i> Grant,	336	Wallace <i>v.</i> Brown,	303
Sinclair <i>v.</i> Earl of Fife's Trus- tees,	378	Wallace and Cunningham <i>v.</i> Kennedy,	116
Small <i>v.</i> Millar,	90	Watherston <i>v.</i> Renton,	659
Smith <i>v.</i> Bogle,	579	Watson <i>v.</i> Ainslie,	336
Smith and Bogle <i>v.</i> Gray,	531	Wauchope <i>v.</i> Ferrier,	259
Smith <i>v.</i> Taylor,	185	Wellwood's Trustees <i>v.</i> Well- wood,	673
Smollet <i>v.</i> Smollet's Creditors,	200	Wemyss <i>v.</i> Countess of Moray,	441
Snodgrass <i>v.</i> Buchanan,	531	Wemyss (Earl of) <i>v.</i> Magis- trates of Perth,	442
Soot's Trustees <i>v.</i> Peddie's Heirs,	69	Wilson <i>v.</i> Campbell,	501
Spalding <i>v.</i> Houlditch,	667	Wilson <i>v.</i> Fraser,	23
Spence <i>v.</i> Bruce,	432	Wilson <i>v.</i> Glen,	716
Spier's Trustees <i>v.</i> Napier,	109	Wilson <i>v.</i> Harvey,	576
Stewart <i>v.</i> Agnew,	221, 242	Wilson <i>v.</i> Pollock,	571
Stewart <i>v.</i> Calder,	248	Wilson <i>v.</i> Reid,	754
Stewart <i>v.</i> Douglas,	174, 185	Wilson's Trustees <i>v.</i> Stewart's Trustees,	300
Stewart <i>v.</i> Heron,	243	Workman <i>v.</i> Crawford,	115
Stewart <i>v.</i> Hoome,	13	Wright <i>v.</i> Falconer,	662
Stewart Bruce <i>v.</i> Scott,	334, 464	Wylie <i>v.</i> Duncan,	134
Stewart's Trustees <i>v.</i> Walker's Trustees,	139	Y	
Stewart's Trustees <i>v.</i> Wilson's Trustees,	300	Young and Trotter <i>v.</i> Anderson,	66
Syme <i>v.</i> Dickson,	194	Yuille <i>v.</i> Morrison,	579
T			
Tailors of Aberdeen <i>v.</i> Coutts,	269		
Taylor <i>v.</i> Mein,	696		

## INDEX OF MATTERS.

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### ACCRETION.

1. Where a party uninfest grants conveyances to several parties, and he is himself thereafter infest, his infestment accretes to the other parties in the order of their recorded infestments, 304.
2. Where a party infest *a me*, but unconfirmed, grants infestments to two creditors, the posterior of whom obtains his infestment confirmed, and the prior creditor thereafter obtains himself and his author confirmed in the same deed, the posterior creditor will be preferred, 306.
3. The infestment of an heir does not accrete to a right granted by his ancestor who died uninfest, 308.
4. Where the granter of a conveyance has at the time no right to the subject, but acquires a right by a subsequent title, does accretion take place? 315.

### ADJUDICATION.

1. An adjudication, although followed by charter and sasine, if not accompanied by possession, is lost by the negative prescription, 337.
2. A charter of adjudication, followed with possession for forty years from the expiry of the

legal, vests an absolute right of property in the adjudger without a declarator of expiry of the legal, 432.

### ASSIGNATION.

1. An assignation transmits a reserved real burden, 29.
2. Is it essential to an effectual assignation of a reserved real burden that it be recorded in the Register of Sasines? 37.

### CLARE CONSTAT.

1. Infestments proceeding upon precepts of *clare constat* are a sufficient title for prescription without their warrants, 372.
2. Heirs founding upon infestments proceeding upon precepts of *clare constat* are not bound to produce their original charter, although it may be extant; and if the charter were produced, and were found to be null, it would not deprive the party of his prescriptive title, 373.
3. Can the possession of an heir possessing on an infestment proceeding on a precept of *clare constat* be conjoined with that of a disponent from the heir, where the possession of the heir has not extended to forty years? 440.

CONDITION.

1. If a condition in a feudal grant is conceived in terms to make it real, and is not objectionable on any other ground, no irritant clause is necessary to give it effect against singular successors, 279.

CONSOLIDATION.

1. Consolidation of the superiority and property may be effected by prescriptive possession of the latter, following on a title to the former, and this although the effect of the consolidation may be to bring the latter under the fetters of a strict entail, 534.
2. Ought the doctrine of consolidation by prescription to be limited to the case where the two fees of property and superiority are destined to the same series of heirs? 581.

CONSTRUCTION OF TERMS.

1. After a positive signification has been attached to legal terms it ought to be adhered to scrupulously and inflexibly; and there is no form of words to which a definite legal import has been rivetted so strongly as to that of a conveyance to parents in life-rent, and to children in fee, 633.
2. When a doubtful point on the meaning of technical terms is once settled by solemn judgments of the Court, it is most dangerous to alter it, as every person relies on the meaning and import of these terms as explained by the judgments of the Court, 642.

DOUBLE TITLES.

See PRESCRIPTION ON DOUBLE TITLES.

ENTAIL.

1. Where an heir under a personal deed of entail is also the heir of investiture, and makes up a fee-simple title, neither his heritable creditors infest, nor his personal creditors adjudging, will be affected by the entail, 169.
2. When an heir under a personal deed of entail is also the heir of investiture, and makes up no title to the estate, but possesses on apparency, his creditors, whether real or personal, may charge him to enter heir to his predecessor, and then adjudge the estate, 174.
3. The creditor of an heir of entail, who has no title to the estate independently of the entail, cannot attach the estate if the entail remains personal, nor will the circumstance of the entail not being recorded avail the creditors. The right of such an heir will be affected by all the qualities and conditions of the entail, 186.
4. Where a party is not heir of investiture, but has right to an estate under two personal titles, the one free and the other fettered, and he possesses without completing either title, obligations incurred by him cannot be made good against the estate after his death, 195.
5. An entail feudalized but not recorded, does not exclude those creditors of the heir possessing under it from attaching the estate, whose debts, whether

personal or real, were contracted prior to the date of recording, 201.

6. An entail not recorded has no force, and is equal to an entail not yet existing in reference to any third party contracting with the heir possessing under it. Debts contracted by heirs possessing under an unrecorded entail are in the same situation as entailer's debts, and the creditors are not affected by any subsequent recording of the entail, 220.
7. Infetment upon an onerous entail, in which the entailer is institute, and against whom, as well as against the other heirs, the prohibitions are directed, excludes those creditors of the entailer from attaching the estate whose debts were not made real prior to the infetment, 221.

#### FACULTY TO BURDEN.

1. Where a right flowing from the exercise of a reserved faculty to burden has not been made real in the lifetime of the party in whose favour the power is reserved, the onerous singular successors of the disponent are not affected by the right, 38.
2. Where a party conveys lands under a reserved faculty to burden with debt, debts contracted either before or after the date of the disposition are held to be a valid exercise of the reserved faculty, 63.
3. Land may be conveyed to one party under burden of a faculty reserved to another party to burden with debt, and an infetment granted by the party in whose favour the faculty is

reserved, although himself uninfet, is effectual, 66.

#### FEE AND LIFERENT.

1. A conveyance to a parent in life-rent, and to his children unborn or unnamed in fee, imports a right of fee in the parent, and a *spes successionis* merely in the children, 602.
2. No distinction is to be made between the effect of a destination of land and a money provision to a party in life-rent, and his children *nascituri* in fee, 621.
3. The decisions make no distinction between land and money; and with regard to money treat a disposition to the parent for life, with the remainder to the children *nascituri*, without the word *allennarly*, as a deed which may be defeated by the parent, who is considered the *fiar*, 624.
4. After a positive signification has been attached to legal terms, it ought to be adhered to scrupulously and inflexibly; and there is no form of words to which a definite legal import has been rivetted so strongly as to that of a conveyance to parents in life-rent, and to children in fee, 633.
5. A conveyance to a parent in life-rent, for his life-rent use *allennarly*, or under restrictive words of similar signification, and to his children *nascituri* in fee, imports a right of life-rent in the parent, and also an interim fiduciary fee in him for behoof of the children, 634.
6. When any doubtful point on the meaning of technical words is once settled by solemn judgments of the Court, it is most



- dangerous to alter it, as every person relies on the meaning and import of these terms as explained by the judgments of the Court, 642.
7. Where a father, being infest, conveys to himself in liferent, for his liferent use allenary, and to his children in fee, and upon this conveyance takes infestment in liferent only, and in the instrument of sasine no mention is made of the children in fee, the lands remain attachable by the father's creditors, 662.
  8. In what manner are the parties having right to a fiduciary fee to make up their title? 671.
  9. Has a fiduciary fiar power to act as a trustee for the real fiar, so as to bind him by any proceedings adopted by him for the protection of the estate? 679.
  10. A conveyance to trustees for behoof of a parent in liferent, and his children *nascituri* in fee, imports a fee in the children, and a liferent merely in the parent, 685.
  11. A conveyance by a parent to himself in liferent, and to his child *nominatim* in fee, imports a fee in the child, 708.
  12. Where a parent conveys to himself in liferent, and to his child *nominatim* in fee, or takes a conveyance from another in these terms, but reserves to himself power to alienate and burden, the substantial fee is in the parent, and that in the child is nominal merely; but if the reserved power to alienate is not exercised, the child takes as disponent, and does not require to be served heir to his father, 712.
  13. A conveyance to a husband and wife in conjunct fee and liferent, for the wife's liferent use allenary, and to a child *nominatim* in fee, imports a right of fee in the father, and on his decease the child must serve to him as heir of provision, 716.
  14. A conveyance to a husband and wife, and the longest liver in conjunct fee and liferent, and to the heirs of the marriage in fee, imports a right of fee in the husband, 723.
  15. A conveyance to a husband and wife in conjunct liferent during all the days of their lifetime, and to the survivor, and their heirs and assignees in fee, imports a right of fee in the survivor, 733.
  16. A conveyance by a husband or wife to both the spouses, and to the longest liver in liferent, and to the children of the marriage in fee, does not import a right of fee in the survivor of the spouses, but leaves the fee untransferred, 741.
  17. A conveyance by a husband or wife to both the spouses in conjunct fee or liferent, for their liferent use allenary, and to the heirs of the marriage in fee, whom failing, to the heirs whatsoever of either or both of the spouses, leaves the fee untransferred in the event of there being no heirs of the marriage, and gives a *spes successionis* merely to the heirs whatsoever of the spouses, 754.
- GENERAL SERVICE.
1. A general service carries a reserved real burden, 27.

## GROUND-ANNUALS.

1. Ground-annuities follow the land, and do not remain personal in the original donee after he has been divested, 69.
2. The essential character of a ground-annuity is that of a debt by the land and its fruits. It cannot subsist as a mere personal right. Both in its constitution and in its transference it is inseparably connected with real estate, 77.
3. Possession ceasing by a divestiture of the lands, the ground-annuity, as respects the party so divested, ceases also. By disconnecting himself with the lands in which it is charged, he at the same time equally disconnects himself with the ground-annuity itself, for all terms falling due thereafter, 78.
4. The right of ground-annuity participates of the history of a feu. A feu-charter originally was a unilateral deed, which conveyed the subject for payment of a certain feu-duty. In order to get readier access to payment of the duty, as well as to forfeit without losing right to arrears, the feu-charter was adopted, 82.
5. Arrears of ground-annuities do not bear interest, unless that is expressly stipulated for in the deed reserving the ground-annuity, 109.

## MINOR.

1. The minority of a *verus dominus* suspends the running of the positive prescription, 470.
2. Minority cannot be pleaded by an heir of entail for the purpose of interrupting the positive pre-

scription, unless he has in him a right to the estate, such as to entitle him to compete with the person in possession, 477.

3. Minority interrupts, but it must be the minority of a person having a right to compete. Minority can never be sustained when pleaded by a person not having a right to compete for, and to evict, the estate from the person in possession, 480.

## PARTS AND PERTINENTS.

1. A clause of parts and pertinents is a sufficient title on which to prescribe a right of property in a subject expressly included in the titles of another party, 441.
2. A right of servitude may be acquired by prescriptive possession under a bounding title having no clause of parts and pertinents, 416.

## PERSONAL AND REAL.

1. An onerous assignee to an heritable bond of annualrent not feudalized, who takes infestment on the unexecuted precept in the bond, is not affected by the back-bond of his cedent, 110.
2. An adjudger on account of a personal debt, or a trustee for creditors, is equally unaffected by the debtor's personal obligations as an heritable creditor or an onerous purchaser is; and the doctrine of taking *tantum et tale*, in so far as relates to personal obligations affecting the debtor, has no place in the case of feudal rights, 120.
3. The principle of the feudal law is clear, that no feudal right can be burdened with a personal right, and if the feudal right re-

- mains in the debtor, the adjudger takes it out of him by the adjudication. The reason that dispositions are not required to be recorded is, that they are mere personal deeds, 125.
4. Where the heir of investiture neglects a recorded personal deed of entail, and makes up a fee-simple title, neither his heritable creditors, nor his personal creditors adjudging, will be affected by the entail, 169.
  5. Where the heir of investiture neglects a recorded personal deed of entail, and makes up no title to the estate, but possesses on apparency, his creditors, whether real or personal, may charge him to enter heir to his predecessor, and then adjudge the estate, 174.
  6. The creditors of an heir of entail, who has no title to the estate independently of the entail, cannot attach the estate if the entail remains personal, nor will the circumstance of the entail not being recorded avail the creditor, 186.
  7. If an heir of entail possesses without the entail ever having been completed by infestment, and if he is not the heir of investiture, his right will be affected by all the qualities and conditions of the entail, and no creditor or purchaser can say that he deals with such an heir on the faith of the record, 193.
  8. A personal right to lands, like every other personal right, is affected by every quality or condition, though not appearing upon record. The records have nothing to do with personal rights to lands, 194.
  9. Where a party is not heir of investiture, but has right to an estate under two personal titles, the one free and the other fettered, and he possesses without completing either title, obligations cannot be made good against the estate after his death, 195.
  10. Where a party goes back to a remote ancestor, and connects himself with a feudal right, his creditors are free from the qualifications of any personal right; but where the party connects himself with one who has merely a personal right, his creditors must take that right with all its qualifications, 199.
  11. An entail feudalized but not recorded does not exclude those creditors of the heir possessing under it from attaching the estate, whose debts, whether personal or real, were contracted prior to the date of recording, 201.
  12. An entail not recorded has no force, and is equal to an entail not yet existing, in reference to any third party contracting with the heir possessing under it. Debts contracted by heirs possessing under an unrecorded entail are in the same situation as entailer's debts, and the creditors are not affected by any subsequent recording of the entail, 220.
  13. Infestment upon an onerous entail, in which the entailer is institute, and against whom, as well as against the other heirs, the prohibitions are directed, excludes those creditors of the entailer from attaching the estate where debts were not made

- real prior to the infeftment, 221.
14. Where the heir of investiture makes up a title to the estate to the exclusion of a disponee under a preferable personal title, rights granted by the heir, and made real before the disponee has established his preferable claim, will be good against the estate although the right of the heir should afterwards be reduced, 243.
  15. A feudal investiture is not liable to be defeated, qualified, or abated, by any condition or obligation that is not incorporated in the texture of the owner's infeftment. All such obligations or conditions are, therefore, ineffectual in a question with an onerous and *bona fide* purchaser from such feudal owner, 250.
  16. A feudal owner may have come under engagements with respect to the disposal of his property, or he may have granted backbonds or separate obligations in abatement or alteration of the quality or condition of his interest in the lands; but unless these obligations are incorporated in his investiture, they do not efface, or at all modify or impair his real connexion with the subject as established and vouched by his documents of feudal right—the charter and sasine. These obligations are extrinsic of the investiture of property, and do not take away, or at all touch the power naturally incident to the state or connexion with, and actual command over the subject, 251.
  17. The records do not invest a purchaser with absolute and impregnable security. They do not defend him against every imaginary ground of challenge of his author's right. A purchaser is not protected where his author's feudal investiture, although *ex facie* regular, is intrinsically vitious, as involving a falsehood in its texture, and assuming that for true which never happened, 255.
  18. Although rights granted by the heir of investiture, and made real before the disponee under a preferable personal title has established, his right will be good against the estate, an adjudication led by a personal creditor of the heir during the dependence of an action of declarator at the disponee's instance will be excluded, 259.
  19. An obligation *ad factum prestandum*, if made the condition of a feudal grant, and if it enter the investiture of the disponee, may be enforced against a singular successor, although neither declared a real burden nor protected by an irritancy, 269.
  20. If a condition in a feudal grant is conceived in terms to make it real, and is not objectionable on any other ground, no irritant clause is necessary to give it effect against singular successors. If it is clearly personal or exposed to objections, an irritant clause will not support it, 279.
  21. An irritancy will not make a personal burden real, although, when the words are not sufficiently precise, it may be of use to explain the intention of the parties, 283.
  22. In order that an obligation in

favour of a disponent may run with the land, and so be effectual against singular successors, it is necessary that it be declared a real burden on the land, and not conceived a burden upon the disponent merely, 293.

23. The right to claim a share of the expense of a mutual gable from the adjoining proprietor is a real right, and passes by a conveyance of the tenement without any special mention of it, 300.

POSSESSION.

1. The possession of a vassal is the possession of the superior. A superior, therefore, after conveying the superiority of the subject to a party, but still retaining it in his own titles, may re-acquire it by the vassal in the lands obtaining an entry from him, instead of from the party to whom the right of superiority had been conveyed, 369.
2. Possession under a prescriptive title must be continuous, peaceable, uninterrupted, and exclusive, 378.
3. A divided possession will not establish a title to exclude, 393.
4. Possession of the surface in virtue of a title to the lands, without continuous working of the coal beneath it for forty years, is not sufficient to prescribe a right to the coal, in competition with an express reservation to the coal in a prior or preferable infestment, 409.
5. Prescriptive possession under a title to a patronage is not constituted by a single act of presentation, 416.
6. Possession under a charter of adjudication for forty years from the expiry of the legal, vests an absolute right of property in the adjudger, without a declarator of expiry of the legal, 432.
7. The possession of heirs on apparenancy, or disponents on a personal title, is reckoned in the period of prescription, where the title is a charter and sasine, 433.
8. Can the possession of a disponent be conjoined with that of an heir possessing an infestment proceeding upon retours or precepts of *clare constat*, where the possession of the heir has not extended to forty years? 440.
9. Immemorial possession of a servitude openly and continuously had, implies a grant of servitude, 461.
10. The possession of a party possessing on a title bearing a reversion *in gremio*, is the possession of the reverser, and the reverser's right is saved from the negative prescription, 467.
11. In order to prevent a right of reversion being lost by the positive prescription, it is necessary that the reversion be clearly expressed in the infestment of the party possessing the lands. A general reference to a reversion engrossed in the prior titles is not sufficient, 469.

PRESCRIPTION.

1. A feudal right of property cannot be lost by the negative prescription, 316.
2. An unrecorded sasine is not a sufficient title to prescription, 324.
3. Extrinsic objections to a title are

- lost by the negative prescription, 324.
4. Intrinsic objections to a title may be pleaded at any time, notwithstanding the lapse of prescription, 336.
  5. An adjudication, although followed by charter and sasine, if not accompanied by possession, is lost by the negative prescription, 337.
  6. All inquiry into prior titles is excluded by the positive prescription, even although the prior title is narrated *in gremio* of the title on which prescription is pleaded, 338.
  7. A prescriptive title almost always implies some falsehood connected with it. A title perfectly good requires no prescription, prescription being only necessary to cure bad titles, 342.
  8. A superior, after conveying the superiority to a party, but still retaining it in his own titles, may re-acquire it by the vassal in the lands obtaining an entry from him, instead of from the party to whom the right of superiority had been conveyed,—the vassal's possession being held to be the possession of the superior by whom the entry was granted, 369.
  9. Infestments proceeding upon retours or precepts of *clare constat* are a sufficient title for prescription without their warrants, 372.
  10. Heirs founding upon infestments, proceeding upon retours or precepts of *clare constat*, are not bound to produce their original charters, although they may be extant, 373.
  11. If an heir founding upon infestments, proceeding upon retours or precepts of *clare constat*, were to produce his original charter, and it were to be found null and void, it would not deprive the party of his prescriptive title, 376.
  12. A divided possession will not establish a title to exclude, 393.
  13. A reservation in favour of a superior not expressed in the original investiture, and unaccompanied by any act of possession of the reserved subject by the superior, will not deprive the vassal of his right to the subject reserved, although the reservation may have been contained in his titles for upwards of forty years, 403.
  14. Possession of the surface, in virtue of a title to the lands, without continuous working of the coal beneath it, for forty years, is not sufficient to prescribe a right to the coal in competition with an express reservation of the coal in a prior and preferable infestment, 409.
  15. A single act of presentation under a title to a patronage, is not sufficient to constitute prescriptive possession, 416.
  16. Possession upon a charter of adjudication for forty years from the expiry of the legal, vests an absolute right of property in the adjudger, without a declarator of expiry of the legal, 432.
  17. Where the title of prescription is a charter and sasine, the intermediate possession of heirs on apparenay, or of disponers on a personal title, is reckoned in the period of prescription, 433.
  18. A singular successor, though uninfest, is entitled to plead the

- positive prescription, if he can connect with an infestment, 439.
19. Can a disponent from an heir possessing on infestments proceeding upon retours or precepts of *clare constat*, conjoin his possession with that of his author, where the possession of the latter has not extended to forty years? 440.
  20. A clause of parts and pertinents is a sufficient title on which to prescribe a right of property in a subject expressly included in the titles of another party, 441.
  21. A positive servitude may be lost by the negative prescription, even although it is engrossed in the title of the servient tenement, 448.
  22. A negative servitude cannot be lost by prescription, except by continuous acts for forty years on the part of the owner of the servient tenement inconsistent with the servitude, 450.
  23. Although a party cannot acquire a right of property by prescriptive possession on a bounding title having no clause of parts and pertinents, he may on such a title acquire a right of servitude, 456.
  24. A right of reversion recorded in the Register of Sasines, is no bar to the positive prescription, 464.
  25. As long as a person possesses on a right bearing a reversion *in gremio*, his possession is that of the reserver, and the reserver's right must be saved from a negative prescription. But the exception in the Statute 1617 does not hinder a party from acquiring a right which he had not before. It would be against that Statute to hold that a registered reversion was a perpetual bar to prescription, 467.
  26. In order to prevent a right of reversion being lost by the positive prescription, it is necessary that the reversion be clearly expressed in the infestment of the party possessing the lands. A general reference to a reversion engrossed in the prior titles is not sufficient, 469.
  27. The running of the positive prescription is suspended by the minority of the *verus dominus*, 470.
  28. The positive prescription does not run against persons having a contingent right in an estate, but only against such persons as have a right to the estate vested in them. An heir of entail, therefore, cannot plead upon his minority to interrupt, unless he has in him a right to the estate, such as to entitle him to compete with the person in possession, 477.
  29. Minority interrupts, but it must be the minority of a person having a right to compete. Minority can never be sustained when pleaded by any person not having a right to compete for and to evict the estate from the person in possession, 480.

#### PREScription OF RETOURS.

1. All challenge of retours is barred by the vicennial prescription, as well in the case of heirs of provision as of heirs *jure sanguinis*, 583.
2. A party served heir cannot be disturbed in his rights as heir after twenty years, by any

action brought by another person claiming to be heir. But the party so served heir may be disturbed by any person who comes in with a stronger title than that of mere hardship, 593.

3. There is no authority for the doctrine, that mere heirs of provision, who are not heirs *jure sanguinis*, cannot plead the vicennial prescription, 599.

#### PREScription ON DOUBLE TITLES.

1. Where a party having a right to lands under two titles, the one limited and the other absolute, completes his title under the latter, and possesses upon it for forty years, the former, although the preferable and governing title, is extinguished by prescription, 510.
2. Where a party having right to lands under two titles, does not complete his title under either, but possesses on apparency for forty years, the former is not extinguished by prescription, but remains the preferable and governing title, 522.
3. Where a party having right to lands under two titles, both of which are unlimited, but contain different destinations, neglects the one last in date, and completes his title under the other, the former remains the governing title, and is not extinguished by prescription, 531.
4. The *dominium utile* may be consolidated with the *dominium directum*, by prescriptive possession of the former, following on a title to the latter, although the effect of the consolidation may be to bring the former under the fetters of a strict entail, 534.

5. Ought the doctrine of consolidation by prescription to be limited to the case where the two fees of property and superiority are destined to the same series of heirs? 581.

#### REAL BURDEN.

1. A reserved real burden must be precise in the amount of the sum, and in the name of the creditor,—must be declared a burden on the lands, and not on the disponent merely,—and must also be engrossed in the sasine by which the burdened estate is conveyed, 1.
2. No unknown or indefinite encumbrance can be created on lands so as to have the effect of a real security in competition with creditors and singular successors, whatever the intention of the granter may have been, 11.
3. A legal burden is not a *quæstio voluntatis*, but must be determined by the legal import of the deeds, whatever may have been the intention of the parties, 15.
4. No technical form of expression is required for the constitution of a real burden, but the intention to impose a burden on land must be expressed in the most explicit, precise, and perspicuous manner. In a clause by which onerous singular successors are to be affected there must be no room for ambiguity, 19.
5. A reserved real burden may be effectually constituted in a procuratory of resignation *ad remanentiam*, 23.



6. A reserved real burden is carried by a general service, 27.
7. A reserved real burden is transmissible by assignation, 29.

RESERVED REAL BURDEN.

See REAL BURDEN.

RESERVED FACULTY TO BURDEN.

See FACULTY TO BURDEN.

RETOURS.

1. Infestments proceeding upon retours are a sufficient title for prescription without their warrants, 372.
2. Heirs founding upon infestments proceeding upon retours are not bound to produce their original charter, although it may be extant; and if it were produced, and found to be null, it would not deprive the party of his prescriptive title, 373.
3. Can the possession of an heir possessing on infestments proceeding upon retours be conjoined with that of a dispoonce from the heir, where the possession of the latter has not extended to forty years? 440.
4. All challenge of retours is barred by the vicennial prescription, as well in the case of heirs of provision as of heirs *jure sanguinis*, 583.
5. A party served heir cannot be disturbed in his rights as heir after twenty years by any action brought by another person claiming to be heir. But the party so served heir may be disturbed by any person who comes in with a stronger title than that of mere heirship, 593.

VOL. III.

6. There is no authority for the doctrine, that mere heirs of provision, who are not heirs *jure sanguinis*, cannot plead the vicennial prescription, 599.

REVERSION.

1. A right of reversion recorded in the Register of Sasines is no bar to the positive prescription, 464.
2. The possession of a party possessing on a title bearing a reversion *in gremio*, is the possession of the reverser, and the reverser's right must be saved from the negative prescription. But the exception in the Statute 1617 does not prevent a party from acquiring what he had not before, 467.
3. No right of reversion is good unless it is registered or incorporated in the titles, 470.
4. No reversion can be said to be incorporated in a sasine unless the import of it is clearly expressed in it, 470.

SERVITUDE.

1. A positive servitude may be lost by the negative prescription, even although it is engrossed in the servient tenement, 418.
2. A negative servitude cannot be lost by prescription, except by continuous acts for forty years, on the part of the owner of the servient tenement, inconsistent with the servitude, 450.
3. A right of servitude may be acquired by prescriptive possession under a bounding title having no clause of parts and pertinents, 456.
4. A servitude is an heritable right accessory to heritable property,

3 D

and does not require special notice in the feudal conveyance either of the dominant or servient tenement. Immemorial possession of a servitude openly and continuously had implies a grant of servitude, 461.

TRUST.

1. A conveyance to trustees for behoof of a parent in liferent, and his children *nascituri* in fee, imports a fee in the children, and a liferent merely in the parent, 685.

THE END.





11



